LIMITATION OF SHIPOWNERS' LIABILITY—THE BRUSSELS CONVENTION OF 1957

IN most seafaring nations, limitation of liability immunizes shipowners from ruinous damages for loss or injury occasioned by wrongful or negligent conduct of employees.[1] Actually an indirect form of subsidy,[2] limitation reflects an internationally prevalent policy of governmental support of local shipping.[3] In operation under the American Limitation Act,[4] for example, a shipowner is permitted to establish a fund from which all claimants—owners of cargo, passengers,[5] seamen,[6] and even shoreside individuals[7]—are to be compensated.[8] The claim may be either contractual or delictual,[9] although contract

1. Limitation history and background have been extensively discussed. See 3 BENEDICT, ADMIRALTY §§ 541-44, 475-78 (6th ed. 1940) [hereinafter cited as BENEDICT]; GILMORE & BLACK, ADMIRALTY 663-67 (1957) [hereinafter cited as GILMORE & BLACK]; ROBINSON, ADMIRALTY 875-77 (1939) [hereinafter cited as ROBINSON]; MARITIME LAW ASS'N, Doc. No. 196, LIMITATION OF SHIPOWNER'S LIABILITY (1935); Putnam, *The Limited Liability of Ship-Owners for Master's Faults*, 17 AM. L. REV. 1 (1883); Sprague, *Limitation of Shipowners' Liability*, 12 N.Y.U.L.Q. REV. 568 (1935); Springer, *Amendments to the Federal Law Limiting the Liability of Shipowners*, 11 ST. JOHNS L. REV. 14 (1936); Note, 35 COLUM. L. REV. 246 (1935).

2. See *Hearings on H.R. 4550 Before the House Committee on Merchant Marine and Fisheries*, 74th Cong., 1st Sess. 145 (1935); Springer, *supra* note 1, at 19. *But see Hearings on H.R. 4550, supra* at 148-49. When used in this sense, "subsidy" refers to a governmental policy which relieves shipowners of an expense they would otherwise be forced to bear. The term is more commonly associated with governmental payments directly to shipowners. For a description of this kind of subsidy, see GILMORE & BLACK 760-69; Adler, *British and American Shipping Policies, A Problem and a Proposal*, 59 POL. SCI. Q. 193, 196-99 (1944).

3. See Hartford Acc. & Indem. Co. v. Southern Pac. Co., 273 U.S. 207, 214 (1927); Petition of the United States, 155 F. Supp. 714, 718 (D. Del. 1957); Petition of Canadian Pac. Ry., 278 Fed. 180, 186-87 (W.D. Wash. 1921); VAN SANTVOORD, LIMITATION OF THE LIABILITY OF SHIPOWNERS UNDER THE LAWS OF THE UNITED STATES 5 (rev. ed. 1887); authorities cited note 1 *supra*.

4. REV. STAT. §§ 4281-89 (1875), as amended, 46 U.S.C. §§ 181-89 (1952).

5. *E.g.*, Butler v. Boston & Savannah S.S. Co., 130 U.S. 527 (1889) (passengers); 3 BENEDICT 358; GILMORE & BLACK 677-78 & n.45 (collecting cases on cargo and passengers).

6. See In the Matter of East River Towing Co., 266 U.S. 355 (1924) (Jones Act claim); Petition of Wood, 230 F.2d 197 (2d Cir. 1956) (same); 3 BENEDICT 358, 363-64.

7. See Richardson v. Harmon, 222 U.S. 96 (1911); The Wichita Falls, 15 F. Supp. 612, 616 (S.D. Tex. 1936) (limitation denied but act held applicable when guards on ship fired on striking longshoremen); GILMORE & BLACK 679 n.45 (collecting cases).

8. REV. STAT. § 4283 (1875), as amended, 46 U.S.C. § 183 (1952); ADMIRALTY R. 51.

9. See 3 BENEDICT 344; GILMORE & BLACK 706. The statement that limitation applies in contract tends to be misleading since limitation is essentially designed to relieve owners from the *respondeat superior* tort doctrine. See authorities cited note 1 *supra*. More accurately, limitation can be described as applying to claims based on an employee's wrongful actions, whether or not the action technically sounds in tort. *Cf.* GILMORE & BLACK

claims may be fully recoverable if the owner's obligation is "personal."[10] Once the fund is distributed, all claimants subject to the court's jurisdiction are denied recourse to the shipowner's other assets.[11] Institutionalization of cargo insurance minimizes the effect of limited recoveries in that sphere,[12] but the denial of full damages to prsonal injury and death claimants, rarely insured, has caused mounting disapproval.[13]

Criticism has also been directed toward the duplication of limitation litigation and the heterogeneity of limitation laws.[14] Since a maritime suit may be commenced by libel in rem against the offending vessel or in personam against her owner,[15] jurisdiction will obtain wherever ship or owner may be served, as well as wherever the owner possesses other property[16] or, in the case of a corporation, does business.[17] And since accidents at sea typically couple claimants of diverse nations with a highly mobile vessel and/or an owner having interests throughout the world, a multiplicity of suits is prac-

599 (cargo claims can be based on either contract or tort). Courts have removed "pure" contract claims from the scope of limitation primarily through application of the personal contract doctrine, see note 10 *infra*, and also by holding them outside the act, see The Leonard Richards, 41 Fed. 818 (D.N.J. 1890).

10. See 3 BENEDICT 371-78; GILMORE & BLACK 706-11; Castles, *The Personal Contract Doctrine: An Anomaly in American Maritime Law*, 62 YALE L.J. 1031 (1953). The doctrine seems to rest on the notion that owners have the privilege of contracting away their right to limitation. See The Philip J. Kenny, 57 F.2d 337 (D.N.J. 1931).

11. See GILMORE & BLACK 671-73. Limitation procedures are governed by ADMIRALTY R. 51-55, which were promulgated by the Supreme Court to fill the procedural void created by the act.

12. See INTERNATIONAL MARITIME COMM., MADRID CONFERENCE—PRELIMINARY REPORTS AND MINUTES AND DRAFT CONVENTIONS 75 (1955) [hereinafter cited as MADRID CONFERENCE]; GILMORE & BLACK 727.

13. See Maryland Cas. Co. v. Cushing, 347 U.S. 409, 437 (1954) (dissenting opinion); GILMORE & BLACK 667 (limitation shows signs of "economic obsolescence"); Springer, *supra* note 1, at 38-39; Note, 68 U.S.L. REV. 617, 641 (1934) (limitation "vicious in its tendencies and unconscionable in its results"). All attempts to institute a system of compulsory passenger insurance have failed. See BISSCHOP, LIMITATION OF SHIPOWNER'S LIABILITY AND COMPULSORY INSURANCE OF PASSENGERS (1927); Note, 35 COLUM. L. REV. 246, 264 (1935).

14. See GILMORE & BLACK 740; DOVER, MARINE INSURANCE 523 (5th ed. 1957); Kuhn, *International Aspects of the Titanic Case*, 9 AM. J. INT'L L. 336, 347 (1915); McMillan, *Scottish Maritime Law and International Trade*, 45 JURID. REV. 63 (1933).

15. GILMORE & BLACK 31-33; MARSDEN, COLLISIONS AT SEA 228 (10th ed. 1953).

16. "[I]n the case of a collision on the high seas, an alien plaintiff has the privilege of suing an alien defendant wherever he can serve him, or attach his property. . . ." Kloeckner Reederei und Kohlenhandel, G.M.B.H. v. A/S Hakedal, 210 F.2d 754, 756 (2d Cir. 1954).

17. As in other areas of the law, an admiralty court must decide how much activity within the jurisdiction is required to make an owner amenable to valid service. See, *e.g.*, Federazione Italiana Dei Consorzi Agrari v. Mandask Compania De Vaporas, S.A., 158 F. Supp. 107 (S.D.N.Y. 1957); Applewhaite v. Saguenay Terminals, Ltd., 150 F. Supp. 825 (S.D.N.Y. 1956) (regular and continuous cargo solicitation held sufficient activity); Ashcraft-Wilkinson Co. v. Compania De Navegacion Geamar, S.R.L., 117 F. Supp. 162 (S.D.N.Y. 1953) (steamship agents and brokers not doing sufficient business on behalf of shipping company to be considered managing agent).

tically guaranteed.[18] Moreover, each of these suits may be governed by a different substantive law,[19] since the principal limitation forums have adopted the conflicts doctrine of *lex fori* in limitation proceedings,[20] rather than the more

18. One recent case involved a collision with 155 claims, including 71 British, 18 German, 8 Dutch, 1 each from Austria, Ireland, Italy, and Norway. See Brief for Petitioners, p. 37, British Transp. Comm'n v. United States, 354 U.S. 129 (1952). In the *Norwalk Victory* case, Black Diamond S.S. Corp. v. Robert Stewart & Sons, 336 U.S. 386 (1949), suits were filed in New York and London, and there was a possibility of a third in Antwerp. Knauth, *Renvoi and Other Conflicts Problems in Transportation Law*, 49 COLUM. L. REV. 1, 3 (1949).

The doctrine of forum non conveniens does not alleviate the shipowner's difficulties to any great extent.

> [T]he case of destroying or injuring a ship, . . . when acted on the high seas, between persons of different nationalities, come within the domain of the general law of nations, or *communis juris*, and are *prima facie* proper subjects of inquiry in any Court of Admiralty which first obtains jurisdiction of the rescued or offending ship at the solicitation in justice of the meritorious, or injured, parties.

The Belgenland, 114 U.S. 355, 362-63 (1885). See generally Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12 (1949). See also Comment, 25 U. CHI. L. REV. 377 (1958). Despite the general rule, jurisdiction may be refused if "special circumstances" are involved. See Comment, 31 TEXAS L. REV. 889, 891 (1953). The existence of a limitation proceeding in another forum, however, will not so qualify. See 68 HARV. L. REV. 706 (1955). And no possibility of transferring or dismissing an in rem action exists. See Motor Distribs., Ltd. v. Olaf Pedersen's Rederi A/S, 239 F.2d 463, 466 (5th Cir. 1957); 32 HARV. L. REV. 574 (1919).

19. "We see no absurdity in supposing that if the owner of the Titanic were sued in different countries, each having a different rule affecting the remedy there, the local rule should be applied in each case." Oceanic Steam Nav. Co. v. Mellor, 233 U.S. 718, 734 (1914) (the *Titanic* case).

20. See *id.* (limitation held procedural so American law applies); Royal Mail Steam Packet Co. v. Companhia de Navegaco Lloyd Brasileiro, 31 F.2d 757 (E.D.N.Y. 1928); 3 BENEDICT 635-37; GRIFFIN, AMERICAN LAW OF COLLISION 53 (Knauth ed. 1949); HURD, MARINE INSURANCE 42 (2d ed. 1952) (British Act applies to foregoing shipowners); 2 RABEL, THE CONFLICT OF LAWS 352 (1947) (Britain and the United States ignore "the place of the tort and of the nationality of the ships" in limitation proceedings); RESTATEMENT, CONFLICTS § 411 (1934). Continental nations apply the limitation law which governs the tort claim. 2 RABEL, *op. cit. supra* at 353.

United States courts are the principal limitation forums. See COMMITTEE TO CONSIDER PROPOSALS RELATING TO THE LIMITATION OF LIABILITY OF SHIPOWNERS, MARITIME LAW ASS'N, DOC. No. 418, REPORT 4262 (1958) [hereinafter cited as MLA REPORT].

The viability of the *Titanic* case may have been weakened by Black Diamond S.S. Corp. v. Robert Stewart & Sons, 336 U.S. 386 (1949). This case, which has been characterized as "extraordinarily obscure," GILMORE & BLACK 737, indicated in dictum that if the foreign limitation law were "substantive" it might be applied to actions brought in this country. A subsequent Second Circuit opinion, however, seems to have rejected any implication in this dictum that would depart from the *Titanic* rule. Kloeckner Reederei und Kohlenhandel, G.M.B.H. v. A/S Hakedal, 210 F.2d 754 (2d Cir. 1954); see Note, 67 YALE L.J. 1445, 1448 n.9 (1958).

The *Titanic* rule has often been criticized. See VAN SANTVOORD, *op. cit. supra* note 3, at 66; Comment, 17 U. CHI. L. REV. 388 (1950). See also The Vestris, 53 F.2d 847, 852 (S.D.N.Y. 1951) (bill to make limit on foreign ships in American courts no higher that the foreign statute failed in Congress).

usual maritime rules of *lex loci delicti* or law of the flag.[21] The injured party's ability to forum shop, therefore, will often have substantial effect on the amount of his recovery.[22]

For example, two claimants suffering identical injuries may obtain disparate damages if only one has the financial resources to prosecute his claim in the United States, where limits are relatively high.[23] Shipowners must not only bear the cost of numerous actions, but may be effectively deprived of limitation benefits through imposition of the maximum statutory liability in each forum-nation.[24]

To ameliorate these problems, and simultaneously remove inequities in internal rules, the 1957 Brussels Convention on Limitation of Liability[25] was promulgated.[26] Submitted to the United States for approval, the convention has been referred to various government agencies and the maritime industry for detailed study.[27] Tentative reactions by the American shipowning community indicate that the convention will encounter substantial opposition when congressional approval is ultimately sought.[28] To further a complete evalua-

21. See ROBINSON § 112; Kuhn, *supra* note 14, at 340; Comment, 31 TEXAS L. REV. 889, 894-95 (1954); Note, 67 YALE L.J. 1445, 1447 (1958).

22. For other factors which encourage forum shopping in maritime cases, see ROBINSON 903-04; MCFEE, THE LAW OF THE SEA 282-83 (1950).

23. Recently, one claimant prosecuted his claim 3,000 miles away from home in order to avail himself of the American limitation statute. Brief for Black Diamond S.S. Corp., Petitioners, p. 35, Black Diamond S.S. Corp. v. Robert Stewart & Sons, 336 U.S. 386 (1949).

24. See Knauth, *supra* note 18, at 3; 68 HARV. L. REV. 706, 708 (1955).

25. The complete text of the convention, as given in Department of State, Press Release No. 577, Oct. 15, 1957, can be found in APPENDIX A. [Hereinafter the convention will be cited by article only.]

26. The Brussels Convention was the culmination of a process that began with a draft prepared by the Comite Maritime International, a private body composed of delegates from various maritime law associations, at Madrid in 1955. See MADRID CONFERENCE. The Diplomatic Conference held at Brussels, on the other hand, was composed of official representatives from the participating nations. For a list of these nations and their subsequent activities concerning the convention, see APPENDIX B. The United States' representatives were Clarence Morse, Federal Maritime Administrator (chairman of the delegation), John W. Mann, Shipping Division, Department of State (vice-chairman), Oscar N. Houston, a leading member of the admiralty bar, and E. Robert Seaver, General Counsel, Maritime Administration. See U.S. Delegation to the Diplomatic Conference on Maritime Law, Official Report, Nov. 18, 1957, p. 2. The only previous attempt to reach international accord in the limitation area was the Brussels Convention of 1922. This agreement was ratified by Belgium, Brazil, Denmark, Finland, France, Italy, Netherlands, Norway, Portugal, and Sweden. 3 BENEDICT § 543, at 639. In this Comment all references to the "Brussels Convention" will be to the 1957 proposal.

27. MLA REPORT 4253; N.Y. Times, May 3, 1959, § 5, p. 17, col. 5.

28. See MLA REPORT 4243:

> Your Committee, after extensive study of the proposed Brussels Convention, concludes that as a whole it is not acceptable to or in the best interests of American shipowners, passengers, maritime labor or shippers. Accordingly, we are unable to recommend that the United States adhere to the proposed Convention, although

tion, this Comment will examine the convention in its historical setting and as it compares with existing American law. Interpretations or amendments necessary either to clarify ambiguities or to effectuate limitation policies will be suggested. And an attempt will be made to outline a course of future conduct toward the convention.[29]

HISTORICAL BACKGROUND

The earliest form of limitation was the civil-law practice, still adhered to in many European nations, of restricting shipowner liability to the value of the vessel at the conclusion of her ill-fated voyage—the "abandonment" doctrine.[30] By thus foreclosing recovery against all assets save the ship, this system often left claimants with a worthless hulk while marine insurance enabled owners to undertake new maritime ventures.[31] Soon the British shipping industry was placed at a competitive disadvantage, for in England the doctrine of *respondeat superior* was as fully applicable afloat as it was ashore.[32] English shipowners finally succeeded, during the early eighteenth century, in obtaining statutory limitation protection.[33] But unlike continental practice, the British system contemplated recompense notwithstanding the ship's total destruction, since liability was limited to vessel value measured immediately before the accident.[34] Subsequently, the preaccident-value formula was replaced by a sum computed by multiplying ship tonnage times a given number of pounds sterling.[35] Prior to the Brussels Convention, the fund was pegged at fifteen pounds per ton, with seven pounds reserved exclusively for personal injury and death claims. The balance was shared with cargo.[36]

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certain provisions are or may be beneficial to various branches of the shipping industry.

Officially, the *Report* represents the efforts of the maritime bar rather than shipowners themselves. But the owners will undoubtedly heed the advice of counsel on a subject as complex as limitation.

29. Relatively few articles have been written about the convention, and most of these have been in British publications, prompted by British ratification. See Aaronson, *The Brussels Conference on Maritime Law, 1957*, 107 L.J. 758 (1957); Giles, *Merchant Shipping (Liability of Shipowners and Others) Act, 1958*, 21 MODERN L. REV. 642 (1958); Hardy-Ivany, *The Merchant Shipping (Liability of Shipowners and Others) Act, 1958*, 108 L.J. 547 (1958); *Conference on Maritime Law*, The Shipping World, Oct. 23, 1957, p. 347.

30. See Sprague, *supra* note 1, at 569; Note, 35 COLUM. L. REV. 246, 247 & n.1 (1935).

31. *Id.* at 259 n.79, 261 n.87.

32. The Main v. Williams, 152 U.S. 122, 126 (1894) (discussing English law); Sprague, *supra* note 1, at 571.

33. Responsibility of Shipowners Act, 7 Geo. 2, c. 15 (1734); Sprague, *supra* note 1, at 571 (statute passed as a result of "severe liability compared with the limited liability enjoyed by ship owners on the Continent").

34. *Id.* at 589; Note, 35 COLUM. L. REV. 246, 262 & n.92 (1935); Kuhn, *supra* note 14, at 346.

35. The Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, § 503; 3 BENEDICT 638-39.

36. See *ibid.*; MLA REPORT 4245.

American shipowners were not alerted to their vulnerability until the Supreme Court held in 1848 that the owner of a destroyed vessel was fully liable for cargo damage.[37] Appealing to Congress, they rapidly secured passage of the Limitation Act of 1851.[38] The statute limited liability to the value of the owner's "interest" in the vessel, but did not specify whether value was to be measured before or after the accident.[39] Congressional debates alluded solely to the British system which at that time utilized the preaccident-value formula.[40] But despite this explicit reference, the Supreme Court, refusing to construe the act as embodying English practice, held that the continental "abandonment" theory had been imported by the act,[41] and that insurance proceeds were not part of the owner's "interest."[42] The inequities inherent in this system went largely unnoticed for the next sixty years, mainly because of

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37. New Jersey Steam Nav. Co. v. Merchants' Bank (The Lexington), 47 U.S. (6 How.) 343 (1848).

38. REV. STAT. §§ 4281-89 (1875); see GILMORE & BLACK 664 (Congress was "easily persuaded").

39. REV. STAT. § 4283 (1875).

40. See 3 BENEDICT 332-33; Sprague, *supra* note 1, at 577-78 (bill introduced to Congress, purported to be English law); GILMORE & BLACK 666 ("The purpose of the 1851 Act had been to put American shipowning interests on a competitive equality with British interests, so far as limitation of liability was concerned. English limitation law, it might have been supposed, was the obvious analogy to which our courts would look in developing our limitation law.").

41. Norwich Co. v. Wright, 80 U.S. (13 Wall.) 104, 119-21 (1871). The Court's decision reflected the fact that the act closely resembled many features in the abandonment system then prevailing on the Continent. *Cf.* British Transp. Comm'n v. United States, 354 U.S. 129 (1957) (act patterned after British statute, but foundations sprang from general maritime law). See also Sprague, *supra* note 1, at 589-90; Note, 68 U.S.L. REV. 561, 572 (1934).

Whatever its rationale, the decision represented a significant step in what one commentator has characterized as the "Americanization" of admiralty law. Comment, 61 YALE L.J. 204, 206 (1952).

42. The City of Norwich, 118 U.S. 468, 494 (1886) (hull insurance). In Maryland Cas. Co. v. Cushing, 347 U.S. 409 (1954), a seaman sued his employer's liability insurance company under the Louisiana direct action statute. Confronted with the first test of the *Norwich* doctrine as applied to liability insurance, and the additional complexity added by the direct action statute, the Court split three ways. Mr. Justice Frankfurter, for one four-justice group, thought *Norwich* controlling, but voted with Mr. Justice Clark in order to break a deadlock. Mr. Justice Clark, fearing that satisfaction from the insurer might leave the insured shipowner without indemnification in a subsequent suit, concluded that the direct action could not be brought until after limitation proceedings were concluded. Then, claimants could sue the insurer for the difference between the total amount of the policy and the amount that the owner was required to pay in the limitation proceeding. Mr. Justice Black, for the dissenters, would have allowed the suit. He rested his argument to a large degree on the distinction between hull and liability insurance. *Id.* at 621.

The result in *Cushing* has been praised, Note, 33 N.C.L. REV. 464, 476 (1955) ("reasoned judicial compromise"), and criticized, *The Supreme Court, 1958 Term*, 68 HARV.

the smallness of the American merchant marine.[43] The 1920's, however, saw an increase in merchant traffic,[44] with a concomitant increase in the number of maritime disasters. Spurred by the 1934 sinking of the Morro Castle,[45] Congress supplemented the postvoyage-vessel-value formula with a guaranteed fund of sixty dollars per ship ton for deaths and personal injuries incurred on ocean-going—as opposed to inland or coastal—craft.[46] Hence, after rateably distributing a vessel-value fund among all interests, personal claimant recoveries are increased, when necessary, to the sixty dollars per ton minimum.[47]

Nevertheless, the act has been called insufficient to protect injured claimants.[48] Indeed, commentators have challenged the logical nexus between modern limitation and its original policy basis.[49] Restriction of *respondeat superior* was first justified by the combination of voyage length and lack of communications, which prevented owner control over crews.[50] With the development of modern ships and effective means of communication,[51] however,

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L. REV. 96, 159-60 (1954) (the decision will discourage owners from taking out insurance and increase rates for those who do).

On the legislative level, Senator Morse introduced a bill which would require owners to pay the proceeds of hull and liability insurance into the limitation fund. 103 CONG. REC. 6257-58 (1957).

43. See GILMORE & BLACK 570; Comment, 67 YALE L.J. 1024, 1027 n.24 (1958).

44. See ECONOMIC ALMANAC 120 (1958).

45. See *Hearings on H.R. 4550, supra* note 2, *passim.* 135 people died in the Morro Castle disaster with "countless" other injuries. While the vessel was insured for $4,000,000, only $20,000 was available for claimants under the value formula. *Id.* at 7. See also Springer, *supra* note 2, at 14; Note, 68 U.S.L. REV. 617, 640-41 (1934) ("glaring injustice"). Actually, the owners of the Morro Castle voluntarily paid claimants a much greater amount than the Limitation Act required. GILMORE & BLACK 717 n.135. A much more striking illustration of the then applicable limitation system was The Princess Sophia, 61 F.2d 339, 355 (9th Cir. 1932), *cert. denied,* 288 U.S. 604 (1933), where 350 people died and the available fund was only $600.

46. 49 Stat. 960 (1935), as amended, 46 U.S.C. § 183 (1952); see Comment, 10 TULANE L. REV. 119 (1935); Note, 28 TEXAS L. REV. 433, 434 (1950).

47. For a description of the act's operation, see GILMORE & BLACK 718; *In re* Panama Transp. Co., 98 F. Supp. 114 (S.D.N.Y. 1951) (example of prorating claims).

48. See MLA REPORT 4243 ("Changed conditions may make it reasonable to . . . increase . . . the sum provided for injury and death claimants."); Statement of Senator Morse, 103 CONG. REC. 6257 (1957) (fund "inadequate in the cases of most casualties or injuries").

49. "Attention should be given to the entire revision of the laws relating to limitation of liability. . . . [They] grew up in an age profoundly different from our own, and there is no reason why today under modern conditions the owner should be other than liable to the full extent." Hoover Report from the Department of Commerce, reprinted in *Hearings on H.R. 4550, supra* note 2, at 42; see GILMORE & BLACK 667; Springer, *supra* note 1, at 38.

50. "[T]he owner of the vessel has no manner of control over it. . . . He is free from personal liability on elementary principles." HOLMES, THE COMMON LAW 27 (1881); see Note, 35 COLUM. L. REV. 246, 247 & n.1 (1935).

51. See MADRID CONFERENCE 417 (ships no longer make two-year voyages). *But see Hearings on H.R. 4550, supra* note 2, at 115 (witness maintains that owners still have no effective control over crew's negligence).

proponents of limitation turned for vindication to the exigencies of shipping. Since a single voyage often represented the entire capital of a particular venture, the further risk created by imposition of personal liability might well have discouraged investment.[52] Present foes of limitation have noted, though, that the growth of corporations as the predominant form of business organization has in fact enabled shipowners to limit liability to corporate assets even without the act.[53] And with the formation of protection and indemnity clubs to insure owners against the risk of liability, denial of limitation would have few effects other than increased premiums.[54]

But abolition of limitation has been strongly resisted. Although conceding that a revised approach is necessary, some have argued that no nation can afford unilaterally to raise the liability ceiling or abrogate limitation entirely because of the competitive disadvantage that would accrue to the local maritime industry. Each nation would prefer to have any changes anchored in the

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52. The great object of the statute was to encourage shipbuilding and to induce the investment of money in this branch of industry. Hartford Acc. & Indem. Co. v. Southern Pac. Co., 273 U.S. 207, 214 (1927); see CHORLEY & GILES, SHIPPING LAW 41 (3d ed. 1957) (disaster to one ship could ruin owner financially). *But see* VAN SANTVOORD, LIMITATION OF THE LIABILITY OF SHIPOWNERS UNDER THE LAWS OF THE UNITED STATES 66 (rev. ed. 1887) (importance of limitation as an inducement to investment greatly exaggerated).

53. See GILMORE & BLACK 667 (limitation developed "before the corporation had become the standard form of business organization"); *cf.* Black Diamond S.S. Corp. v. Robert Stewart & Sons, 336 U.S. 386, 399 (1949) (dissenting opinion) (limitation serves same purpose for maritime venturers as corporate fiction does for the landsmen's enterprise). *But see* CHORLEY & GILES, *op. cit. supra* note 52, at 42 (increase in size of ships matched increase in use of corporate form so disaster can cause as much damage to corporation as it did to individual owner).

Some observers have indicated that owners might take further refuge in the corporate device by incorporating each ship separately if limitation were abolished. MADRID CONFERENCE 197; *Hearings on H.R. 4550, supra* note 2, at 165. But this scheme might prove unsuccessful if courts were willing to pierce the corporate veil. *Cf.* Luckenbach S.S. Co. v. W. R. Grace & Co., 267 Fed. 676 (4th Cir. 1920).

54. See MADRID CONFERENCE 68 (insurance eliminates risks); Gartland, *Limitation of Liability and the Seaplane*, 16 ST. JOHN'S L. REV. 209, 220 (1942) (necessity for limitation "no longer apparent"). *But see* CHORLEY & GILES, *op. cit. supra* note 52, at 42:

> [T]he modern practice of insuring all ships [should not] be an argument against the limitation of the shipowner's liability. For one thing, some ships are still uninsured against some perils they encounter, sometimes through circumstances for which no blame attaches to the owner. More than that, though underwriters reap the direct benefit of such limitation, they are by enjoying it enabled to charge lower premiums, so that in effect the old purpose still holds good. The shipowner's risk is reduced when he lets his vessels sail on a sea adventure.

Protection and indemnity insurance is a form of liability insurance which developed to insure risks which were not covered in the usual collision policy, such as personal injury and property damage claims. For the history and background of protection and indemnity insurance, see BERNARD, MARINE PROTECTION AND INDEMNITY INSURANCE (1957); DOVER, MARINE INSURANCE 486-50 (5th ed. 1957); HURD, MARINE INSURANCE 97, 142-49 (2d ed. 1952); WINTER, MARINE INSURANCE 274-75, 309 (3d ed. 1952).

matrix of an international agreement.[55] The pragmatic impossibility of obtaining universal repeal has eliminated that suggestion from serious consideration. Accordingly, to forestall sporadic unilateral action, the world shipping community sponsored the Brussels Convention.

THE BRUSSELS CONVENTION OF 1957

The Brussels meeting attempted to unify the entire body of substantive and procedural rules which attend limitation proceeding, and not merely to raise and equate limits. Therefore, the convention deals with the problems of when limitation applies,[56] who is entitled to its benefits,[57] and what claims are to be barred from full recovery,[58] besides establishing a limitation formula and a system for distributing the fund.[59] Also, the assembly promulgated a series of rules designed to coordinate related proceedings in different nations.[60]

When Limitation Applies

Limitation will not apply in a ratifying nation unless the vessel involved is "seagoing."[61] By explicitly permitting each signatory to specify the classes of shipping to be included within this term,[62] the convention affords an excellent opportunity to effect needed alterations in the American act. Although it originally protected only those shipowners engaged in international trade,[63] the limitation statute was subsequently amended to include all "vessels," whether or not competing with foreign carriers.[64] Judicial interpretations in-

55. See MADRID CONFERENCE 70 (Italian delegate afraid to increase limits since nations which "remain outside" may have an advantage). The possibility that national legislation would have increased the limits for British shipowners unilaterally may have spurred British efforts to promulgate an international convention which would raise limits throughout the world. See *id.* at 54; 75-76. *But cf.* Note, 68 U.S.L. REV. 617, 637 (1934) (British shipping still grew in the late nineteenth century even though American limitation law more favorable to shipowners).

56. Arts. 1 (1)-(4).

57. Art. 6.

58. Arts. 1(1)-(4).

59. Arts. 2, 3, 4.

60. Arts. 2(4), 3(3)-(4), 5, 7.

61. Art. 1(1) refers only to owners of "seagoing ships," and art. 6 gives charterers and crew members no greater protection than owners.

62. Art. 7.

63. See GILMORE & BLACK 674-75; Maryland Cas. Co. v. Cushing, 347 U.S. 409, 413-14 (1954) (act places American shipowners in a "favorable position" for world trade); The Princess Sophia, 61 F.2d 339, 346 (9th Cir. 1932), *cert. denied*, 288 U.S. 604 (1933) (reluctant to apply act to foreign shipowners since the act was designed to aid American interests); Mundell, *Admiralty Law and Your Pleasure Craft*, 34 U. DET. L.J. 141, 153 (1956). See also Comment, 61 YALE L.J. 204, 205 (1952) (importance of international trade to the United States).

64. The original Act of 1851 excluded inland vessels. REV. STAT. § 4289 (1875); see 3 BENEDICT 403. It was expanded in 1886 to include all "seagoing vessels" and all vessels used on lakes, rivers, or inland navigation, including canal boats, barges, and lighters. 24 Stat. 80 (1886), 46 U.S.C. § 188 (1952).

cluded such craft as scows,[65] motorboats,[66] and pleasure yachts [67] within "vessel." Despite criticism of this extension,[68] Congress bestowed added benefits upon the owners of these small craft by exempting them from the provisions of the act which set aside a special fund, based on tonnage, for personal injury claimants. Thus, liability is still limited by postaccident vessel value.[69]

Perhaps limitation should be denied to all minor inland and coastal craft. Any risk created would be readily insurable. Nor will increased premiums create any competitive disadvantage, since competition comes only from other domestic rivals who would also be denied limitation. Indeed, the owners of pleasure yachts and most rowboats are not engaged in economic competition at all.

Alternatively, Congress could abrogate the postaccident-value formula for these minor craft by including them within the convention's "seagoing" provision. Then, minimum recoveries would be guaranteed, as the tonnage standard adopted by the Brussels meeting creates a fund even if the vessel is entirely destroyed.[70] To ensure that such augmented claimant protection will not

65. See The Sunbeam, 195 Fed. 468 (2d Cir. 1912); *In re* Eastern Dredging Co., 138 Fed. 942 (D. Mass. 1905). See also Goggin v. United States, 79 F. Supp. 812 (S.D. Cal. 1948) (landing craft).

66. See Rautbord v. Ehmann, 190 F.2d 533 (7th Cir. 1951). See also Grays Landing Ferry Co. v. Stone, 46 F.2d 394, 395 (3d Cir. 1931) (dictum says small rowboat not covered while case holds large one is).

67. See Coryell v. Phipps, 317 U.S. 406 (1943); Petition of H & H Wheel Service, Inc., 219 F.2d 904 (6th Cir. 1955).

In one recent case, the claimant founded his argument solely on policy considerations, maintaining that "the inclusion of . . . railroad car lighterage . . . would not contribute in any way to putting American shipping upon an equality with that of other maritime nations." This argument was rejected on the basis that application of the statute was "too clear to require extended discussion." The Rincon Hills v. The Long Branch, 258 F.2d 757, 770 (2d Cir. 1958).

68. See GILMORE & BLACK 700 ("charter of irresponsibility" for yacht owners); *id.* at 674-75; VAN SANTVOORD, LIMITATION OF THE LIABILITY OF SHIPOWNERS UNDER THE LAWS OF THE UNITED STATES 136 (rev. ed. 1887). *But see* Petition of Colonial Trust Co., 124 F. Supp. 73, 75 (D. Conn. 1954) ("There is reason behind a policy of encouraging the building of pleasure craft as well as larger commercial vessels. It gives additional work to shipyards whose men are thus enabled to preserve their skills . . . .").

69. Limitation Act § 183(f), 49 Stat. 1480 (1936), 46 U.S.C. § 183(f) (1952):

> [T]he term "seagoing vessel" [the category of vessels subject to the personal injury provisions] shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in the [general coverage section].

This extension has also been criticized. See GILMORE & BLACK 719-20.

70. The minimum limitation fund created by the convention in personal cases is approximately $52,000 since all vessels are treated as if they weigh at least 300 tons for limitation purposes. Art. 3(5). And while personal claimants have an exclusive right only to $140 a ton, they share another $67 with cargo. See art. 3.

be judicially restricted, Congress should enumerate the types of vessels subsumed by the term "seagoing," and should explicitly deny limitation to all others.[71]

The convention, continuing limitation tradition, applies only when claims arise from the wrongful conduct of employees. Protection is not granted, therefore, for accidents which result from the owner's "actual fault or privity."[72] This phrase, transplanted from the English statute,[73] could conceivably alter American law, since the corresponding language in the Limitation Act—"privity and knowledge"[74]—is thought to have been interpreted more favorably to claimants than its British counterpart.[75] Drafters' debates, however, fail to indicate any intention to confine signatories to English rules of owner culpability.[76] Should the United States adopt the convention, then, the American courts would presumably be free to continue to follow American precedents.

Retention of American precedents would prevent the exchange of "actual fault or privity" for "privity and knowledge" from reversing the trend toward increased claimant protection which has developed steadily under the Limitation Act. Early cases sympathized with the budding maritime industry to the point of excluding claimant protection.[77] Courts then construed "privity and knowledge" as something more than negligence,[78] even if the act would, in

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71. The term "seagoing" is highly ambiguous, since it may either describe a type of vessel or its usual location. See GILMORE & BLACK 720.

72. Art. 1(1).

73. Merchant Shipping Act, 1874, 57 & 58 Vict. c. 60, § 503.

The phrase is also embodied in the Carriage of Goods by Sea Act, 49 Stat. 1210 (1936), 46 U.S.C. § 1304(2)(a) (1952).

74. REV. STAT. § 4283 (1875), 46 U.S.C. § 183(a) (1952).

75. "[T]here has been little to complain of in the application of . . . the right to limit by Continental Courts; but the readiness of the United States Courts to deprive a shipowner of the right of limitation . . . has greatly detracted from the protection afforded by the American Limitation Acts." Statement of British delegate, MADRID CONFERENCE 56.

The leading British cases dealing with "actual fault or privity," however, do not seem to depart from American decisional law to any great degree. See Koninklijke Rotterdamsche Lloyd v. Western S.S. Co., [1957] A.C. 386 (1956); Beauchamp v. Turrell, [1952] 2 Q.B. 207; Standard Oil Co. v. Clan Line Steamers Ltd., [1924] A.C. 100 (1923); The Bristol City, 37 T.L.R. 901 (C.A. 1921). But the area in which U.S. courts have gone furthest in denying limitation—imputing responsibility to corporate employers—has rarely been litigated in England. See note 84 *infra*.

76. See Unofficial (Free Translation) Debates of the Diplomatic Conference on the Laws of the Sea, Brussels [hereinafter cited as Brussels Debates], Morning Sess., Oct. 1, 1957, pp. 19-24.

77. See Note, 68 U.S.L. REV. 561, 567-68 (1934); 3 BENEDICT 333-34 & nn.42-49 (collecting cases).

78. "[M]ere negligence, pure and simple, in and of itself does not necessarily establish the existence on the part of the owner of a vessel of privity and knowledge within the meaning of the statute." La Bourgogne, 210 U.S. 95, 122 (1908); see Capitol Transp. Co. v. Cambria Steel Co., 249 U.S. 334 (1919).

other contexts, have been considered a nondelegable duty.[79] But as subsidies, insurance, and other devices decreased the need for limitation protection, judicial attitudes shifted.[80] For example, recent decisions have denied limitation if the owner delegates responsibility for the vessel to a third party.[81] Also, if the accident is attributable to a defect in the ship existent at time of embarkation, the owner's failure to provide a "seaworthy" vessel may constitute privity and knowledge (and presumably "fault"), even though maintenance and inspection duties were assigned to an admittedly competent employee.[82] Most important, though, is the treatment of imputed responsibility problems created by the corporate form of ship ownership. At one time, courts deciding whether the conduct of a particular employee was to be ascribed to the corporate entity held the company liable only for the acts of managing agents or supervisors high in the corporate echelons.[83] Currently, the corporation is likely to be held responsible for the acts of all persons exercising any type of supervisory authority.[84]

79. See The Yungay, 58 F.2d 352, 356 (S.D.N.Y. 1931) (nondelegable duties "rarely found in limitation of liability issues"); The South Coast, 71 F.2d 891 (9th Cir. 1934), *cert. denied*, 293 U.S. 627 (1935); GILMORE & BLACK 703; *cf.* Earle & Stoddart v. Ellerman's Wilson Line, Ltd., 287 U.S. 420, 427 (1932) ("The courts have been careful not to thwart the purpose of the fire statute by interpreting as 'neglect' of the owners the breach of what in other connections is held to be a non-delegable duty.").

80. "There is at least some reason to believe that the judicial attitude in the second half of the twentieth century will be on the whole hostile to the limitation idea, that the early cases will be whittled down if they are not flatly overruled." GILMORE & BLACK 667. This prediction has been conceded to be of "startling accuracy" by one observer. Statement of E. Robert Seaver, General Counsel, Maritime Administration, MLA REPORT 4269. The case which inspired this endorsement was States S.S. Co. v. United States (The Pennsylvania), 259 F.2d 458 (9th Cir. 1958), discussed at note 84 *infra*.

Privity-and-knowledge case law background has been extensively reviewed in 3 BENEDICT §§ 489-90; GILMORE & BLACK 695-705; ROBINSON § 124.

81. See The Severance, 152 F.2d 916 (4th Cir. 1945) (father gave entire management of ship to son); The Silver Palm, 94 F.2d 776 (9th Cir. 1937), *cert. denied*, 304 U.S. 576 (1938); *In re* Great Lakes Transit Corp., 81 F.2d 441 (6th Cir. 1936). *But see* The Trillora II, 76 F. Supp. 50 (E.D.S.C. 1947).

82. Austerberry v. United States, 169 F.2d 583, 594 (6th Cir. 1948); The Cleveco, 154 F.2d 605, 614 (6th Cir. 1946); New York & Cuba Mail S.S. Corp. v. Continental Ins. Co., 117 F.2d 404, 410 (2d Cir. 1941); Petition of Boat Demand, 160 F. Supp. 833, 836 (D. Mass. 1958). *But cf.* Hartford Acc. & Indem. Co. v. Gulf Ref. Co., 230 F.2d 346, 355 (5th Cir.), *cert. denied*, 352 U.S. 832 (1956) (unseaworthiness not neglect under fire statute).

The trend toward increased claimant protection has not been particularly apparent in the Second Circuit. See The Rincon Hills v. The Long Branch, 258 F.2d 757 (2d Cir. 1958); Blackler v. F. Jacobus Transp. Co., 243 F.2d 733 (2d Cir. 1957) (limitation granted though shipowner on board at time of accident).

83. See *In re* Pennsylvania R.R., 48 F.2d 559 (2d Cir. 1931); Sprague, *Limitation of Shipowners' Liability*, 12 N.Y.U.L.Q. REV. 568, 593-94 (1935) (collecting cases); Springer, *Amendments to the Federal Law Limiting the Liability of Shipowners*, 11 ST. JOHN'S L. REV. 14, 27 (1936) (collecting cases).

84. See States S.S. Co. v. United States (The Pennsylvania), 259 F.2d 458 (9th Cir. 1957), *as modified, id.* at 463, *as amended on denial of rehearing, id.* at 470 (1958); The

American precedents will probably not be followed everywhere, however, and convention inability to adopt definite standards by which owner conduct can be measured will reduce the chances of international uniformity.[85] And, any uniformity that might obtain through universal convention adoption and harmonious interpretation is negated by a proviso allowing the *lex fori* to determine which party—owner or claimant—is to bear the burden of proof in demonstrating "actual fault or privity."[86] This position represents a compromise between conflicting views of French and American delegates. The latter maintained that, since shipowners usually have sole access to relevant facts, placing the burden on claimants would severely handicap them.[87] Despite the

Marguerite, 140 F.2d 491 (7th Cir. 1944); Great Atl. & Pac. Tea Co. v. Brasileiro, 159 F.2d 661 (2d Cir. 1947).

The Pennsylvania, supra, has attracted wide attention in maritime circles. See note 80 *supra*; Letter From Clarence Morse, Maritime Administrator, April 7, 1959, copy on file in Yale Law Library. In that case, the vessel had developed a crack on the voyage preceding the one involved in the case. It was repaired and inspected by the owner's employees, the Coast Guard, and the American Bureau of Shipping. Having passed all tests, the vessel was subsequently used on a voyage where it encountered cold waters and turbulent weather. The ship developed a crack in her hull, at a different place from the original injury, and went down with all hands. After two rehearings, the court denied limitation. The decision seems to stand for several far-reaching propositions. First, although the court explicitly denies any intention to do so, the decision comes close to establishing a rule that owners liable under COGSA for failure to exercise "due diligence" will also be denied the protection of the limitation statute. This position seems to be supported by GILMORE & BLACK 696-97. Also, the decision may indicate that if unseaworthiness is found, the corporation will not be able to escape the privity and knowledge prohibition by maintaining that the ship's condition was caused by nonsupervisory personnel. The duty to ensure the ship's seaworthiness is seemingly placed on the entire corporate entity.

Another convention provision which might cause some difficulties is art. 1(1)(b), which provides that owner may limit against claims brought by people not on board the ship if caused by people not on board the ship "for whose act, neglect, or default, the owner is responsible" only if "the act, neglect, or default is one which occurs in the navigation or the management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers." Superficially, this section seems to allow limitation whether or not the shoreside employee was in the kind of position of responsibility that would require his negligence to be imputed to the owner. But art. 1(1)(b) is qualified by the first paragraph of art. 1(1), which allows limitation "in . . . any of the following occurrences, unless . . . the claim resulted from the actual fault or privity of the owner." Thus, the actual fault or privity requirement is embodied in 1(1)(b); it incorporates the entire body of law relating to imputed responsibility. Actually, this section seems to be a restriction of the owner's right to limit since it insures that limitation will be invoked only when the claim is closely related to the operation of the ship.

85. The French delegate to the convention frankly abandoned any hope to achieve uniformity on this issue: "[The actual fault and privity clause] will permit the tribunals of each country to follow its [*sic*] own conception of the law." Brussels Debates, Morning Sess., Oct. 1, 1957, at 21.

86. Art. 1(6).

87. See Brussels Debates, Afternoon Sess., Sept. 30, 1957, at 11; Brussels Debates, Morning Sess., Oct. 1, 1957, at 21 (statement by Mr. Morse). Under the Limitation Act

cogency of this argument, French representatives, unable to conceive that owners could affirmatively demonstrate lack of fault, insisted that claimants bear the burden of proof.[88] By adopting a *lex fori* rule to reconcile this clash of opinions, the convention encouraged continued forum shopping. Limitation decisions will turn, in many cases, upon which party bears the burden of proof.[89] Thus, claimants financially able to select any forum they wish will litigate in countries adhering to the American system. When the convention next reconvenes to consider amendments, therefore, as is provided for by article 15,[90] the *lex fori* provision should be eliminated, and the burden of proof placed on the shipowner seeking limitation.

Who Can Limit

By providing that "charterers" shall be entitled to limit, article 6 of the convention may conflict with present American law. The Limitation Act's protection is extended only to owners or those who stand temporarily in the posture of owners. Thus, bareboat—demise—charterers, who man, victual, and navigate the vessel, are considered owners *pro hac vice*, and may limit,[91] while time and voyage charterers, who lease crew as well as ship from the owner, may not.[92] Rejection of an American amendment designed to restrict article 6 to bareboat arrangements apparently indicated that the conference desired to include all charterers.[93] Debates, though, reveal that many delegates

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the burden is upon the owner. See Coryell v. Phipps, 317 U.S. 406, 407 (1943); The Silver Palm, 94 F.2d 776, 777 (9th Cir. 1937).

88. Brussels Debates, Afternoon Sess., Sept. 30, 1957, at 12 ("negative proof is no proof at all"); Brussels Debates, Morning Sess., Oct. 1, 1957, at 20.

89. See, *e.g.*, *In re* Jacobson, 52 F.2d 179 (S.D. Tex. 1931) (owner fails to sustain burden of proof).

90. Art. 15 provides that any contracting nation can, after the convention has been in force in that nation for three years, request that the conference reconvene to consider amendments. The convention will not have binding international effect until it has been ratified by ten states, at least five of which have one million gross tons. Art. 10. Only one nation that meets this qualification—Great Britain—has ratified to date. See APPENDIX B.

91. Limitation Act § 186, REV. STAT. § 4286 (1875), 46 U.S.C. § 186 (1952), provides that "the charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels." It is possible to "man, victual, and navigate" the vessel without being a charterer. See Jones & Laughlin Steel Corp. v. Vang, 73 F.2d 88, 90 (3d Cir. 1934), *petition for cert. dismissed on petitioner's motion*, 294 U.S. 735 (1935).

92. See The Severance, 152 F.2d 916 (4th Cir. 1945), *cert. denied*, 328 U.S. 853 (1946); The James Horan, 10 F. Supp. 28 (D.N.J.), *aff'd*, 78 F.2d 870 (3d Cir.), *cert. denied*, 296 U.S. 621 (1935); GILMORE & BLACK 673.

Although the statement of the applicable rule of law is relatively simple, distinguishing among the various types of charterers is often difficult. See, *e.g.*, Petition of United States, 155 F. Supp. 714, 717 (D. Del. 1957); Banks v. Chas. Kurz Co., 69 F. Supp. 61, 66 (E.D. Pa. 1946).

93. The amendment would have inserted "demise" before the word "charterer." Brus-

did not appreciate the distinctions among the various charterers which the United States sought to draw;[94] thus, Congress may be free to restrict this provision to bareboat lessees.

If so, Congress could adopt the convention with a restrictive interpretation of article 6, or it could accept the convention as extending limitation protection to time and voyage charterers. The latter alternative would not seriously disadvantage personal injury claimants, who would normally sue owners, to whom the negligence of employees is usually imputed,[95] rather than time or voyage charterers. And allowing all charterers to limit would produce more rational results than the Limitation Act, which may offer scant protection to both those shipowners who also charter and those who charter to others. Often, during periods of short tonnage, large shipping lines supplement their own fleets with time or voyage chartered vessels.[96] If one of the chartered vessels is involved in an accident, the shipping line may be forced to pay damages to cargo claimants without the benefit of limitation. Yet, assuming an identical mishap with an owned or demised vessel, protection would be afforded. The act's benefits, therefore, are dependent on the fortuitous circumstance of the particular vessel's status.[97] If the owner is chartering to

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sels Debates, Afternoon Sess., Oct. 8, 1957, at 16. It was defeated by a vote of 5-15-10 (for, against, abstain). *Id.* at 23.

94. At one point, Mr. Houston clearly indicated that his motion was intended to exclude time charterers from the convention's scope. *Id.* at 17. But M. Ripert, the French delegate, did not seem to understand the distinctions which Houston sought to draw:

> At the beginning of this Conference it was agreed that limitation of liability could be invoked not only by the shipowner but also by *the person who takes full charge of a ship*; by the charterer, who is, after all, the real operator. Now, the United States delegation envisages simply the demise charterer, which is not at all the same as the one who, chartering a vessel engages in the operation of his ship. . . .

Id. at 23. (Emphasis added.)

More important, the convention never held a separate vote on the charterer issue. The United States' motion was presented as an alternative to a British proposal which, *inter alia*, extended limitation to the servants of the charterer, manager, and operator of the ship, and to agents of the owner. Most of the debate revolved around these latter provisions as they were not included in the American alternative. *Id.* at 15-23. In fact, the British delegate never even addressed himself to the charterer problem. See *id.* at 17, 20. And it is impossible to decide on what basis the final vote was cast, particularly since one-third of the nations abstained. See note 93 *supra*.

95. See California v. The Jules Fribourg, 140 F. Supp. 333, 337 (N.D. Cal. 1956) (negligence of master imputed to owner not charterer). *But cf.* Petition of Skibs A/S Jolund, 250 F.2d 777, 787 (2d Cir. 1957).

96. See GILMORE & BLACK 171.

97. "If it be unequal, and in that sense inequitable, that the owner of the vessel should be relieved by the statute from a large part of the damage resulting from the negligence of his own employe, while the charterer who suffers from the same negligence is not relieved, it can only be said that this relief is a statutory and arbitrary one. . . ." Smith v. Booth, 110 Fed. 680, 684 (S.D.N.Y. 1901).

Some of the hardship caused by the statute may be relieved by recasting the forms of the charters. "Time" charterers, for example, may be able to arrange the transaction so as to bring themselves under the limitation canopy. See American Subcomm., *Report*, in

others, the presence of indemnification agreements may render the act's protection illusory. Under present law, claimants, such as cargo, who can choose between suing a negligent owner in tort or a non-bareboat-charterer for breach of contract, will choose the latter, because limitation would not apply. But as the charter party usually provides for complete indemnification in this situation, the charterer will in turn collect from the owner.[98] Thus, the chance interposition of the charterer may require owners to satisfy fully otherwise limitable claims. Inversely, cargo claimants, who are able to sue a charterer *ex contractu* for failure to deliver, can receive full compensation, while other claimants, injured in the same accident, will have recourse only against the owner, and will collect limited damages.

Besides precluding such haphazard recoveries, article 6 ensures that owner liability will not exceed the limitation ceiling. Hence, though separate suits are instituted against charterer and owner, a recovery of full limited damages from either will bar collection of additional compensation from the other.[99] Otherwise, claimants with actions against both might well sue the shipowner for the limitation fund, and then seek additional damages from the charterer who would later be compensated by the owner under an indemnification agreement. Many nations ratifying the convention probably will apply article 6 to all charterers.[100] Both rational application of limitation principles and international uniformity would be served by similar American extension.

But the convention provisions which extend limitation coverage to crewmembers are of more dubious wisdom.[101] Under American law, limitation has

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MADRID CONFERENCE 199 ("The ship venture is often in major substance that of the time charterer only. Since he may protect himself by assuming the 'victual and man' status of the demise charterer, no valid objection is seen to direct protection.").

98. See, *e.g.*, Pennsylvania R.R. v. McAllister Lighterage Line, 240 F.2d 423 (2d Cir. 1957); GILMORE & BLACK 796 (owner responsibility clause reprinted as part of sample charter). See also The Barnstable, 181 U.S. 464, 471 (1901) (no general right to indemnification without contract).

The owner cannot limit against the charterer's claim since it is based on his personal contract. See note 10 *supra* and accompanying text.

99. The pertinent portion of art. 6 states that "the total limits of liability of the owner and all such other persons in respect of personal claims and property claims arising on a distinct occasion shall not exceed the amounts determined in accordance with Article 3 of this Convention." This section would not seem to apply to indemnification agreements between charterer and owner as it comprehends only those claims which can be limited. Moreover, with charterers able to limit, the indemnification payment will rarely exceed the owner's limited liability.

100. At the Madrid Conference the British delegate indicated that Britain would probably extend limitation to time charterers. MADRID CONFERENCE 59. And the codification of the convention into British law refers to "any charterers." Merchant Shipping (Liability of Shipowners and Others) Act, 1958, 6 & 7 Eliz. 2, c. 62, § 3(1); see Giles, *Merchant Shipping (Liability of Shipowners and Others) Act, 1958*, 21 MODERN L. REV. 642, 643 (1958).

101. Art. 6(2):

> [T]he provisions of this Convention shall apply to charterer, manager and operator of the ship, and to the master, members of the crew and other servants of the

traditionally been considered only a device for protecting shipowners, and was therefore never expanded to include employees.[102] The convention clause was presumably inserted to forestall possible union demands for employee indemnity agreements which could result in shipowner payments greater than the limitation fund.[103] And the convention also blocked two possible paths to this result within a context of employee limitation. First, since the crewmember's personal negligence would necessarily constitute "actual fault," employee limitation is applicable in spite of fault.[104] Second, employers may credit employee reimbursements against the fund.[105] For example, if the statutory ceiling is ten, recovery of eight from crewmen would restrict claimant recourse against the shipowner to two. Arguably, this "single limit" provision alone would furnish sufficient owner protection against over-ceiling payments to obviate the necessity of limiting employee liability. Total indemnification payments would exceed the normal limit only in the unlikely instance when a seaman would be able to respond in damages for more than the fund amount.[106]

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owner, charterer, manager, or operator acting in the course of their employment in the same way as they apply to an owner himself . . . .

Art. 6(3):

When actions are brought against the master or against members of the crew such persons may limit their liability even if the occurrence which gives rise to the claims resulted from the actual fault or privity of one or more of such persons. If, however, the master or member of the crew is at the same time the owner, co-owner, charterer, manager or operator of the ship, the provisions of this paragraph shall only apply where the act, neglect or default in question is . . . committed . . . in his capacity as master or as member of the crew of the ship.

102. See notes 1 and 8 *supra*.

The convention also changes American law by allowing the owner to limit notwithstanding his personal negligence if he is acting in his capacity as a crewmember. Art. 6(3). For examples of American law see Petition of Follett, 1959 Am. Mar. Cas. 258 (S.D. Tex. 1958) (limitation denied when owner operated his own motorboat); King v. Liotti, 76 N.Y.S.2d 98 (Sup. Ct. 1947) (same).

Apparently, the convention was designed to allow owners of small ships to man their own vessels without risking unlimited liability. See Aaronson, *The Brussels Conference on Maritime Law, 1957*, 107 L.J. 758 (1957). This provision should be given a restrictive interpretation in order to preserve claimant protection. Thus, whenever the owner-crewmember is required to make a decision or assume a responsibility that in other situations would be handled by a crewmember only if the owner were not available, he should be treated as if he stood in the posture of an available owner. Otherwise, he would be able to increase his protection by assuming personal command.

Also, art. 7, which allows shipowners of a ratifying nation to limit in all other adherent countries, would alter the provision of the Death on the High Seas Act which prevents foreign shipowners from limiting against death claims in United States courts. 41 Stat. 537 (1920), 46 U.S.C. § 764 (1952).

103. See MADRID CONFERENCE 470.

104. Art. 6(3); see MADRID CONFERENCE 470.

105. See art. 6(2).

106. The only danger in this system is that claimants might be able to sue owners directly on the indemnification agreement in the same manner that suits are allowed directly against insurance companies in some states. *Cf.* Maryland Cas. Co. v. Cushing, 347

And denying protection to employees would nullify any criticism of extending limitation to a class able to enjoy its benefits despite personal negilgence.

Nonetheless, extension of limitation to crewmembers would not greatly prejudice claimants, who would usually look to the owner for satisfaction rather than the often judgment-proof seaman. Indeed, if the crewmember's negligence caused a serious collision, any possible contribution he could make would represent at best only an insignificant portion of the total damages. Realistically, then, this section should not substantially impede convention ratification in the United States.

Claims Subject to Limitation

The convention allows limitation against all maritime and nonmaritime claims for "personal injury . . . damage to . . . property or infringement of any rights."[107] Additionally, article 1(3) extends limitation to cases in which "proof of negligence" need not be introduced—cases of absolute liability.[108] This provision, when read in concert with article 1(1)(c), could conceivably affect American law. For, by separately enumerating the two most prominent maritime strict-liability situations known in America—injuries to harbors and injuries caused by unremoved wrecks[109]—article 1(1)(c) leaves uncertain what other claims would be covered by American adoption of article 1(3)'s "proof of negligence" clause.[110]

U.S. 409 (1954). See also W. R. Grace & Co. v. Charleston Lighterage & Transfer Co., 193 F.2d 539, 544 (4th Cir. 1952) (owner liable directly to third party suing charterer).

107. Art. 1(1).

108. Art. 1(3); see Brussels Debates, Morning Sess., Oct. 8, 1957, at 2, 11-12.

Another section of art. 1 prohibits limitation against salvage and general average claims. Art. 1(4)(a). The general average reference comports with United States law. See The Wm. J. Quillan, 168 Fed. 407 (S.D.N.Y. 1909); The Rapid Transit, 52 Fed. 320 (D. Wash. 1892). The opposite is probably true of salvage claims. GILMORE & BLACK 677 n.45; see *id.* at 726 n.159; 3 BENEDICT 356.

The convention's alteration seems needed. As salvage awards are granted in order to insure that aid to distressed vessels is freely rendered, any limitation would negate the incentive furnished by the award. Moreover, the salvor's fee is only tangentially related to acts of the owner's servants, and is not the kind of expense usually viewed in the perspective of *respondeat superior.*

109. Under American law, the owner can limit against the strict liability imposed by state and city laws regulating canals and harbors. See City of Newark v. Mills, 35 F.2d 110 (3d Cir. 1929); The Central States, 9 F. Supp. 934 (E.D.N.Y. 1935); 3 BENEDICT 365 & n.74 (collecting cases); GILMORE & BLACK 679. But he cannot limit against the absolute liability imposed by the Federal Wreck Statute, 30 Stat. 1152 (1899), 33 U.S.C. § 409 (1952). See The Snug Harbor, 53 F.2d 407, 411-12 (E.D.N.Y. 1931) (duty to mark wreck personal and nondelegable).

110. This difficulty seems to have arisen because the British delegate insisted that the convention specifically provide limitation against liability based on wreck or harbor damage. See Brussels Debates, Morning Sess., Oct. 8, 1957, at 11. Why he refused to accept the Norwegian delegate's contention that these liabilities were included in art. 1(3) is unclear. See *id.* at 11-12.

Perhaps article 1(3) could nullify the "personal contract" doctrine now obtaining in English and American law. Judicially constructed, this principle denies the owner limitation whenever losses occasioned by a maritime accident result from a breach of his personal covenant.[111] The doctrine is usually invoked in charterers' actions against owners for breach of warranty of seaworthiness.[112] And, since no actual "proof of negligence" need be introduced in warranty actions,[113] courts might deem them comprehended by article 1(3), allow limitation, and thereby effectively repeal the personal contract doctrine. This result is not dictated by the convention; debates refer to article 1(3) only in the context of absolute tort liability.[114] If abrogation of the well-established personal contract principle were intended, it is inconceivable that it would neither be referred to nor discussed. True, this approach, interacting with article 1(1)(c), would deprive article 1(3)[115] of much content in the United States. Still, such a result is preferable to sudden (and perhaps unintentional) revocation of the doctrine. Rejection—or codification—should follow only after specific consideration of the many ramifications that could attend either course.

Limitation Amount

Throughout history, various mechanisms have been employed to establish the limits of owner liability. Value of the vessel at the beginning or end of the voyage, before or after the accident, or a stated currency amount per ship-ton have all been applied by different nations to different claims at different times.[116] Attempting to find a single method uniformly applicable, yet univer-

111. See note 10 *supra* and accompanying text.

112. See The Soerstad, 257 Fed. 130 (S.D.N.Y. 1919) (doctrine limited solely to warranty of seaworthiness action) (L. Hand, J.); Cullen Fuel Co. v. W. E. Hedger, Inc., 290 U.S. 82 (1933); Pendleton v. Benner Line, 246 U.S. 353 (1918); W. R. Grace & Co. v. Charleston Lighterage & Transfer Co., 193 F.2d 539 (4th Cir. 1952); W. E. Hedger Transp. Corp. v. Gallotta, 145 F.2d 870 (2d Cir. 1944); The Fred Smartley, Jr., 108 F.2d 603 (4th Cir. 1940); GILMORE & BLACK 707.

113. In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship-owner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute . . . and does not depend on his knowledge or ignorance, his care or negligence.

The Caledonia, 43 Fed. 681, 685 (C.C.D. Mass. 1890), *aff'd*, 157 U.S. 124, 130 (1895), cited with approval in The Edwin I. Morrison, 153 U.S. 199, 210 (1894).

114. See note 108 *supra*.

115. Art. 1(3) could apply only to a small class of cases in which liability might conceivably be deemed absolute. See The Frederick Luckenbach, 15 F.2d 241 (S.D.N.Y. 1926) (deviation); 3 BENEDICT 369 (statutory faults other than Wreck Statute).

116. The following limitation systems are currently in effect:

British—provides a specific sum per ton for both personal and property damage (used by Great Britain and Canada).

Latin—owner discharges liability by abandoning ship to claimants. Thus, the limitation amount is the value of the ship and freight pending at the termination of the voyage

sally acceptable, the convention settled on the English tonnage formula for all claims.[117] The British fund ceiling was boosted, however, by utilizing a complex sliding-scale mechanism which now provides, in terms of American currency, 140 dollars per ton for personal injury and death recoveries exclusively, and sixty-seven dollars more to be divided rateably with cargo.[118] Also, a floor was placed under the fund by a provision presuming all ships to weigh at least 300 tons.[119] Thus, the United States system, which retains as its base the post-voyage-value formula for all claims, but guarantees personal claimants a basic fund of sixty dollars per ship-ton, was completely rejected.[120] This underlies most industry opposition to the convention in this country. Shipowners maintain that abandonment of the ship to claimants, now reflected in the value formula, remains the theoretical basis of modern limitation statutes, with tonnage provisions for personal claimants merely a necessary exception.[121] Additionally, antagonism can be traced to a fear that intensive review of limitation policy, certain to attend any alterations in the recovery formula, might eventuate in complete denial of protection.[122]

Shipowner hostility notwithstanding, the tonnage mechanism should be approved, for it represents a surer path to proper recovery than the postvoyage-value formula. True, under American law, a limit measured exclusively by value applies to personal injury and death claims only on certain inland and

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preceding the filing of the claims (used by Egypt, Greece, Japan, Roumania, and all the Central and South American countries (except Brazil)).

German—claims can be filed only against the ship in rem and not against the owner.

Brussels Convention of 1922—owner liable for the value of his ship or a given value per ton, whichever is lower (used by Belgium, Brazil, Denmark, Finland, France, Italy, Netherlands, Norway, Portugal, Spain, and Sweden).

American—property claims limited to value of ship and freight pending at termination of voyage giving rise to the claim; personal claims guaranteed a fixed amount per ton fund. See 3 BENEDICT 643-47; MARITIME LAW ASS'N, Doc. No. 196, LIMITATION OF SHIPOWNERS' LIABILITY 2014-27 (1935).

117. Art. 3.

118. The "sliding scale" is found in the provisions stating the limitation figure in terms of the gold content of a Poincaire franc. See note 137 *infra* and accompanying text. For the translation of the art. 3(1) figures into American currency (3,100 gold francs currently equal $207), see U.S. Delegation to Diplomatic Conference on Maritime Law, Official Report, Nov. 18, 1957, p. 5.

119. Art. 3(5).

120. See also MADRID CONFERENCE 473-74.

121. See MLA REPORT 4256-58.

122. "The only objection I have heard, aside from minor objections to incidental provisions that could easily be corrected in the implementing legislation, stems from a fear that Congress might repeal the Limitation Act if the subject is brought up in any way." Letter From Clarence G. Morse, Maritime Administrator, April 7, 1959, p. 3, copy on file in Yale Law Library; see Statement of the Vice-President of the International Maritime Committee, MADRID CONFERENCE 80 (the MLA stated that it would be "dangerous" to submit a limitation draft to Congress because someone with a "demagogic mind" might suggest abolition of limitation); *id.* at 473 (American delegate expressing fear that if question of limitation opened, "no one can tell where that may lead").

coastal craft.[123] But under a plan based solely on value, even in this limited area, a collision which totally or substantially destroys the vessel, and hence the source of the personal claimant's limitation fund, is the one most likely to result in serious injuries.

In the field of cargo damage, on the other hand, the shift to tonnage would affect marine carriers of all types. Because of extensive insurance coverage, not prevalent in the personal injury sphere, the only real issue in this context is whether the shipper's or owner's insurer must bear the loss. But the problem takes on added importance with the realization that the value formula has subverted the substantive admiralty rules on distributing risk of cargo damage, and, concomitantly, misallocated the premium increases attending loss reimbursement. The governing statute—COGSA—renders shipowners liable, in the absence of "due diligence," for unseaworthiness and mishandling of cargo, but assigns to shippers the hazards of negligent navigation or management of the ship.[124] Accidents caused by unseaworthiness often result in sunken or badly damaged vessels, however, and the postvoyage-value formula, therefore, frequently exonerates owners entirely. Thus, COGSA's risk distribution scheme is thwarted, since the risk avoided by the owner through limitation is shunted to the shipper (the unsatisfied cargo claimant).[125] Though the monetary limits of tonnage also blunt the full impact of COGSA, this system will at least prevent the bulk of insurance risks from being thrust upon cargo. In fact, the tonnage formula can redound to the shipowner's ultimate advantage; courts may refuse to grant limitation if this would result in complete denial of recovery to cargo. A system of guaranteed minimum damages might well preserve owner protection.[126]

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123. See note 69 *supra* and accompanying text.

124. The Carriage of Goods by Sea Act §§ 4(1)-(2), 49 Stat. 1210 (1936), 46 U.S.C. §§ 1303-04 (1952).

125. Admittedly, COGSA specifically provides that it does not repeal the Limitation Act. 49 Stat. 1212 (1936), 46 U.S.C. § 1308 (1952). See also 29 CALIF. L. REV. 56-57 (1940). Nothing in COGSA, however, should prevent the adoption of a limitation system that better effectuates COGSA policies. Indeed, one leading treatise seems to indicate that limitation should be denied under the present Limitation Act if liability is established under COGSA. GILMORE & BLACK 696-97. And there is some indication that this approach is finding acceptance in the courts. See States S.S. Co. v. United States (The Pennsylvania), 259 F.2d 458 (9th Cir. 1957), discussed at note 84 *supra*.

Use of the tonnage system as a measure of liability to cargo has also been urged on the grounds that it gives the owner an incentive to exercise proper care. See MADRID CONFERENCE 82-83 (Swedish delegate). Otherwise the shipowner may find it more profitable in some instances to abandon his ship and cargo completely than to incur salvage expenses which merely preserve the ship's value for cargo claimants.

126. It seems quite possible that the Court of Appeals [in *The Pennsylvania*, discussed at note 84 *supra*] might have been motivated, at least in part, by a feeling that the result of our Limitation Act is unduly harsh. Under the formula of the Brussels Convention, the court would not have been faced with denying any recovery to the claimants if it allowed the owner to limit . . . .

It seems clear that the court would have been more favorably disposed to limiting liability if it could have done so and still allowed a modicum of recovery to

The tonnage system, unlike value or value-plus-tonnage, promotes the certainty necessary for a uniform limitation law. Under value-centered mechanisms, variations in the methods used to appraise the vessel, coupled with divergent application from jurisdiction to jurisdiction, result in substantially discrepant limitation funds.[127] Moreover, "value" partially depends on the state of the charter market. Thus, the more active the shipping, the greater the recovery.[128] With tonnage, however, courts are relieved of the lengthy and difficult task of determining ship value.[129] All parties can precalculate their risks and adjust insurance coverage accordingly.

Convention foes have focused on the supposed arbitrariness of the tonnage measure. They maintain that tonnage was originally designed to reflect ability to pay by approximating actual value per ton, and that this goal is not realized by the Brussels figures.[130] Admittedly, older vessels are rarely worth 207 dol-

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> the claimants . . . . [T]he present opinion is a manifestation of the judicial erosion that can be expected unless a limitation formula is adopted that meets the sense of justice . . . .

Statement by E. Robert Seaver, General Counsel, Maritime Administration, in MLA REPORT 4270. The same thought has been expressed by Clarence G. Morse, Federal Maritime Administrator. See N.Y. Times, May 3, 1959, § 5, p. 17, col. 5.

127. > [T]he value of ships fluctuates not only in the country of their origin but fluctuates widely according to the place where they are valued. Until a few years ago, a vessel was worth nearly double in France, . . . what she was worth in England —two . . . contiguous countries. . . .
>
> . . . .
>
> Again, is the claimant for recovery to depend upon factors of that type, over which he has no control?

Statement of British Delegate, Brussels Debates, Morning Sess., Oct. 1, 1957, at 5.

128. > During the last six months, . . . the freight market has collapsed. . . . The result of that has been that the value of the tonnage of second-hand vessels has been halved or more than halved. . . . [I]s it just that the recovery of the claimants against the shipowner should depend upon the fluctuations of the freight market? Because that is what the value system does entail . . . .

Ibid.; see Giles, *Merchant Shipping (Liability of Shipowners and Others) Act, 1958*, 21 MODERN L. REV. 642, 643 (1958) (under value formula recovery depends upon "fortuitous circumstances"). See also N.Y. Times, Jan. 12, 1959, p. 77, col. 5 (used ship prices fell 50% in 1958); N.Y. Times, April 27, 1959, p. 48, col. 7 (used ship values "tumble" to new lows).

129. For cases illustrating the difficulty of determining value, see The Black Eagle, 87 F.2d 891, 893 (2d Cir. 1937); *In re* Union Ferry Co., 37 F.2d 95 (2d Cir. 1930); Lowery v. The Ellen S. Bouchard, 1959 Am. Mar. Cas. 251 (N.D.N.Y. 1958). *Compare* The Steel Inventor, 36 F.2d 399, 400 (S.D.N.Y. 1929) (use market value, disregard book value and reconstruction costs), *with* The Natrona, 25 F.2d 507, 508 (E.D. Pa. 1928) (no market so use "value to owners" based on cost less depreciation, plus advantage of having vessel ready for use).

130. See MLA REPORT 4245, maintaining that the English Act of 1862, which first introduced the value formula, was designed to be a "rough average value of all ships" which saved the difficulty of individual valuations. The *Report* goes on to state that "with the passage of time all relationship to value has disappeared and the figures have become arbitrary."

The convention's alleged "arbitrariness" has been condemned as discriminatory against low-cost ships. See *id.* at 4257; MADRID CONFERENCE 197.

lars a ton, while postwar ships generally are worth more.[131] The ability-to-pay argument, however, is theoretically unsound. First, limitation is utilized only after serious accidents, when amounts realizable by converting the vessel would be unrelated to its preaccident per-ton value. More important, even if the tonnage multiplier could be geared to actual value, this could debase the policy of claimant protection. Limitation funds would then be lowest for the older vessels and claimant recoveries would be least where possibilities of injury may be greatest.[132] Finally, the protection of maritime enterprises whose use of low value ships may indicate their inability to pay large damage claims could be accomplished by protection and indemnity insurance, without special limitation benefits.[133]

Marine liability insurance, in fact, has greatly diminished the significance of any particular limitation formula. As increased limits can be covered at only a slightly higher premium cost,[134] with increases passed on to cargo or passengers through higher rates, shipowner expense can be discounted. Instead, attention should be directed to securing a limitation formula both internationally acceptable and productive of adequate claimant recoveries. Tonnage achieves both goals. Arguably, a fund based on the number of passengers or amount of cargo carried would result in a more rational recovery scheme.[135]

131. See Statement by E. Robert Seaver, MLA REPORT 4271.

132. A vessel's age is considered important when determining its P. & I. rates presumably because older vessels are more likely to have defects which give rise to claims. See BERNARD, MARINE PROTECTION AND INDEMNITY INSURANCE 53 (1957).

133. See note 134 *infra*.

134. See Statement of British Underwriter, MADRID CONFERENCE 445: "I would like to give it as my personal opinion that the eventual effect upon insurance cost will be almost negligible. The number of cases involving limitation on the existing basis is comparatively small when one pays regard to the vast field of our insurance activities." The underwriter may have underestimated the importance of limitation statutes in determining P. & I. rates. See BERNARD, *op. cit. supra* note 132, at 50 (limitation one of two principal factors considered in P. & I. rates); DOVER, MARINE INSURANCE 513-14 (5th ed. 1957) (importance of limitation in marine insurance); Libby, *Some Aspects of Protection and Indemnity Insurance*, 1952 INS. L.J. 684, 689 (owner's ability to limit a "prime factor"). But even under the existing law owners may lose their right to limit under certain circumstances, see notes 10, 72 *supra* and accompanying text, and must thus insure for amounts greater than the statutory limitation figure, see BERNARD, *op. cit. supra* note 132, at 50.

Keying an insurance system to the tonnage formula should not prove difficult since present P. & I. premiums are geared to ship tonnage. See WINTER, MARINE INSURANCE 309 (3d ed. 1952).

For a discussion of similar problems in respect to aircraft, see Parker, *The Adequacy of the Passenger Liability Limits of the Warsaw Convention of 1924*, 14 J. AIR L. & COM. 37, 41 (1947).

135. Under a system based on passengers or cargo carried, the funds available would automatically increase with the funds needed to afford adequate recoveries. For passengers, the fund would be calculated by establishing a limitation amount per passenger such as is done in the Warsaw Convention for airplanes. See Parker, *supra* note 134. Unlike the Warsaw plan, however, the aggregate of passenger limits could constitute a single fund so that individual recoveries could exceed the per-passenger figure. Actually, the

Any theoretical vulnerability of the tonnage formula is overcome, however, by its pragmatic value as a mechanism most acceptable to a maximum number of nations. Introduction of a new device, untested by any country, might not have been as widely approved and would thus have frustrated the uniformity goal. Moreover, whatever flaws exist in the adopted system are alleviated by the increased limits, which guarantee adequate claimant recoveries in all but the most calamitous maritime disasters.[136]

The major fault in the convention's tonnage plan is its failure to incorporate an elastic standard which will automatically adjust the fund ceiling to secular economic trends. The "sliding" scale adopted fails to achieve flexibility. Thus, the limitation figure is stated in terms of a fixed quantity of gold—the Poincaire franc—which is to be translated into the currency of the forum-nation at the commencement of each action.[137] Supposedly, then, shifts in gold values would alter the size of the available fund. But gold values do not ebb and flow with the fiscal tide; world prices are "pegged" by the United States' willingness to purchase gold at a stated figure.[138] Only when this price is changed will the recoverable amount increase.[139] This defect would not be cured by retaining the value formula, however, for ship values are not a true indication of business cycles. Indeed, they often decline in periods when the economy is generally expanding.[140] Due to the extraordinary complexities of international finance, only intense study by monetary experts could produce a truly flexible fund limit plan. Signatory nations should underwrite such research; the only alternative is constant modification of obsolescent fund limits.

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tonnage system operates somewhat in this fashion since heavier vessels usually carry the most passengers. But some of the most serious maritime accidents have concerned low tonnage vessels which carried many passengers. See *Hearings on H.R. 4550 Before the House Committee on Merchant Marine and Fisheries*, 74th Cong., 1st Sess. 65-66 (1935); Spencer Kellog & Sons v. Hicks, 285 U.S. 502, 506 (1932) (86 persons aboard 45 foot launch). See also Brussels Debates, Afternoon Sess., Oct. 1, 1957, at 14.

136. The convention was designed "to establish a ceiling which should only be reached in rare cases of catastrophe." Brussels Debates, Afternoon Sess., Oct. 1, 1957, at 12. Even the Russians, who opposed any form of limitation for passenger claims, agreed that the personal injury fund would be adequate in all but "the 'Titanic' and two or three other cases." Brussels Debates, Morning Sess., Oct. 1, 1957, at 17. See also Note, 35 COLUM. L. REV. 246, 259 n.78 (1955) (listing passenger recoveries in major accidents). Moreover, the major sea disaster is a comparatively rare occurrence. See *Hearings on H.R. 4550*, *supra* note 135, at 78 (as of 1946 only 168 accidents throughout the world in 100 years where more than 100 people killed). And there are 7,000 personal injury claims of an individual nature (such as a passenger or crew member tripping or falling) to one general catastrophe. *Id.* at 63. See also BERNARD, *op. cit. supra* note 132, at 26 (most P. & I. claims are for injuries to seamen).

137. Arts. 3(1), (6).

138. See SAMUELSON, ECONOMICS 316-17 (4th ed. 1958).

139. Under the Warsaw Convention, which utilizes a similar recovery standard, limits were increased from $5,000 to $8,291.67 when the United States raised the price of gold from $20.67 to $35 an ounce. See Parker, *supra* note 134, at 39.

140. For the decline in ship values during relatively prosperous recent months, see note 128 *supra*.

The convention fails to stipulate whether the Poincaire franc is to be converted under the forum-nation's government or market rate of gold. A West German motion to permit translation on the basis of market was summarily defeated, however, during the convention's closing hours.[141] And debates indicate that the convention contemplated the use of "official" rates.[142] But disparate recoveries will obtain unless market is universally adopted and, consequently, forum shopping for hard-currency nations will be encouraged. To illustrate the problem, assume that the government of Ruritania officially maintains that each unit of its currency—spondoolicks—contains the same amount of gold as one Poincaire franc. Suppose further than this figure is $\frac{1}{35}$ of an ounce. Presume, though, that a vendor of gold could sell one ounce to the United States Government for thirty-five dollars, and that thirty-five dollars at the market rate can be exchanged for seventy spondoolicks.[143] Obviously, then, vendors will sell in the United States, since by reconverting they can obtain twice as many spondoolicks as would have been received had they sold directly to the Ruritanian government. Similarly, if Ruritania uses government rates to establish the local limitation fund, plaintiffs with a claim worth thirty-five Poincaire francs who are financially able to sue in the United States will collect thirty-five dollars (worth seventy spondoolicks), while those forced to sue in Ruritania will collect only thirty-five spondoolicks.

Number of Limitation Funds

The convention provides for a separate fund on each "distinct occasion" of liability—each unrelated accident during the same voyage.[144] In this area, the major problem is determination of causal connection. Thus, if a vessel first decimates a small fishing boat, sustaining no damage herself, and two days later breaks in half on a sand bar, the lack of causal connection, the existence of "distinct occasions," and the appropriateness of dual funds under the convention are clear.[145] For a more realistic illustration assume that a ship's steering mechanism is damaged in one collision, and that this defect, coupled

141. See Brussels Debates, Afternoon Sess., Oct. 9, 1957, at 17-19 (motion defeated 7-13-8). The motion was presented to the assemblage as a permissive reservation rather than a provision to be included within the body of the convention. *Id.* at 17. Some delegates may have opposed the proposal on procedural rather than substantive grounds because they considered it improper in the form of a reservation. *Ibid.* (remarks of Mr. Asser, Netherlands delegate); *id.* at 18 (statement of chairman that proposed reservation doesn't require approval of substance). The United States voted for the German motion. *Ibid.*

142. Britain opposed the proposal because "the market rate is quite a different thing and I think we ought to have general agreement that the only permissible rate is the official one." *Id.* at 18.

143. Some nations define the gold content of their national currency in manners not always conforming with economic reality. See DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 183 (1954).

144. Art. 2(1).

145. *Cf.* GILMORE & BLACK 722.

with additional negligence, causes a second accident before the vessel can return to port. Whether the convention contemplates that parties injured on both occasions will be able to draw on one or separate funds is uncertain. American precedents offer no guides, the analogous provision in the Limitation Act never having been tested.[146] Dual-fund construction would seem preferable, though, since protection and indemnity insurance—which almost invariably covers as many accidents as occur during the policy period—will preclude irreparable owner injury.[147] Accordingly, the convention should be interpreted as requiring separate funds in all borderline situations.

Distribution of the Fund

One of the unresolved problems in American limitation law is whether or not maritime-lien priorities should be observed in the distribution of a limitation fund.[148] Although the delegates at Brussels considered this problem, the convention's language does not clearly resolve it. Article 3(2) provides that, "the distribution among the claimants shall be made in proportion to the amount of their established claims." The strikingly similar language of the American Limitation Act—"compensation . . . in proportion to losses"[149]—has been interpreted by at least one recent treatise to allow priorities.[150] Convention debates, however, indicate that this result is contrary to the intent of the draftsmen.[151] Thus, the convention provision may be subject to criticism, since the policies that underly the creation of priorities in substantive maritime law would seem equally valid when the funds are paid in a limitation

146. The "distinct occasion" provision in the Limitation Act applies only to personal injury and death claims. 49 Stat. 960 (1935), 46 U.S.C. § 183(d) (1952). Since no American cases have yet been decided under this clause, one treatise suggests that courts will turn to English case law for precedents. GILMORE & BLACK 722. See also 3 BENEDICT 401-02. But the problem of precedents would seem to be relatively unimportant as determination of "distinct occasion" is primarily a question of fact. See also Purdy, *The Recent Amendment to the Maritime Limitation of Liability Statutes*, 5 BROOKLYN L. REV. 42, 58 (1935).

147. See BERNARD, *op. cit. supra* note 132, at 51; MADRID CONFERENCE 414 (British delegate indicates that it would not make a "pennyworth of difference" in P. & I. rates if limitation by occasion or voyage.)

148. GILMORE & BLACK 724.

149. See Limitation Act § 184, REV. STAT. § 4284 (1875), 46 U.S.C. § 184 (1952).

150. GILMORE & BLACK 724-25.

151. A motion to allow the recognition of priorities was explicitly rejected by the conference. Brussels Debates, Afternoon Sess., Oct. 8, 1957, at 30-31. During the discussion of this motion the French delegate stated:

> The question was discussed at length at Brighton, at Madrid, and right here and each time it was clearly specified that in the case of each of the two parts of the limitation fund, the claimants would be on an equal footing, without a privilege rank being granted to one rather than to the other.

Id. at 30; *accord*, Brussels Debates, Afternoon Sess., Oct. 1, 1957, at 4 (Belgian delegate maintains that draft disposes with preferences).

context.[152] But the significance of this issue is slight under the convention's compensation system. Personal claims, which have equal lien priority,[153] are satisfied from a special fund.[154] Priority problems will arise, therefore, only upon distribution of the property damage fund to claimants, all of whom are usually insured.[155]

International Procedures

Establishing monetary limits is, of course, only the first step in a limitation system; unless owners are immunized from additional liability once the original fund is exhausted, protection will be rendered illusory. And within the context of optimum owner protection, claimant recovery should be facilitated. Prior to the Brussels assemblage, little consideration had been given to the problem internationally, although a number of domestic systems had been devised.[156] In the United States, monition and injunction have been used to establish compulsory concourse of claims. Once proceedings are instituted, all claimants are required to appear in the limitation forum and are enjoined from prosecuting their actions in other courts.[157] Thus, all evidence and testimony relating to a particular accident are consolidated in a single suit.[158] More im-

152. "If the applicable rules of law establish priorities among a debtor's creditors, why should the unilateral act of the debtor (in filing a petition for limitation) destroy the priorities? One might as reasonably suggest that on the filing of a petition in bankruptcy secured and unsecured creditors should share alike in the debtor's assets." GILMORE & BLACK 727.

153. *Ibid.*

154. See art. 3.

155. See GILMORE & BLACK 727.

156. The English allow an owner who has paid foreign claims to credit the amount of those claims against the limitation fund. See MARSDEN, COLLISIONS AT SEA 202 (10th ed. 1953). And the English courts will delay distribution until the results of the foreign litigation are known. See *ibid.*

Apparently the question of a foreign claims credit has never arisen in U.S. courts. See MLA REPORT 4250.

157. ADMIRALTY R. 51; see The Salvore, 36 F.2d 712, 714 (2d Cir. 1929).

The concourse provisions work both ways, however, and owners may be required to forego alternate actions themselves in order to limit. See A. C. Dodge, Inc. v. Carras, 218 F.2d 911 (2d Cir. 1955) (owner agrees to stay Maryland action as a condition of limiting in New York); The Quarrington Court, 102 F.2d 916, 919 (2d Cir.), *cert. denied*, 307 U.S. 645 (1939) (owner lost the right to compel arbitration by invoking limitation).

158. Whether this particular phase of concourse is a proper objective of a limitation proceeding in and by itself is a matter of some dispute. At one time, the Supreme Court described the limitation action as "equitable in its nature . . . [like] a bill to enjoin a multiplicity of suits." Hartford Acc. & Indem. Co. v. Southern Pac. Co., 273 U.S. 207, 215 (1927). Recently, however, the Court noted that the shipowner gets no greater rights than "airline, bus or railroad companies who also suffer a multiplicity of suits." Lake Tankers Corp. v. Henn, 354 U.S. 147, 153 (1957). This latter position was previously adopted by the Second Circuit, which envisions concourse primarily as a means of marshalling assets rather than a device to prevent a multiplicity of suits. See Petition of Texas Co., 213 F.2d 479, 482 (2d Cir. 1954), *cert. denied*, 348 U.S. 829 (1954); Petition of Moran Transp. Corp., 185 F.2d 386, 388-89 (2d Cir. 1950).

portant, after the fund has been distributed, the owner is presumably discharged from responsibility toward any claimants that later appear.[159] Nevertheless, a system of domestic concourse leaves the shipowner amenable to suit in the courts of other countries.[160] Hence, on the international level, multiple litigation remains likely.

Multiple Suits

Early drafts of the convention endeavored to establish a system of international concourse. All claimants, wherever situated, would have been required to sue in the nation where limitation was first invoked.[161] This proposal elicited vigorous protests from American delegates, who opposed any procedure that would force United States nationals to prosecute claims on foreign shores.[162] Eventually the original proposal was abandoned, and article 2(4) adopted: "After the fund has been constituted, no claimant against the fund shall be entitled to exercise any right against any other assets of the shipowner . . . if the limitation fund is actually available for the benefit of the claimant." At least one observer has assumed that this ambiguous provision contemplates a worldwide monition and injunction by the fund-court.[163] The convention intended, however, to jettison international concourse.[164] Creating a limitation fund in a foreign nation should not, therefore, foreclose American

159. See 3 BENEDICT 543. See also Dowdell v. United States Dist. Ct., 139 Fed. 444, 445 (9th Cir. 1905); The Adah, 258 Fed. 377, 381 (2d Cir. 1919).

160. *Cf. In re* Dulles' Settlement (No. 2), [1951] Ch. 842 (judgment has no effect on person outside the jurisdiction).

An American claimant who is subject to the court's jurisdiction will be prohibited from instituting a suit based on the same cause of action in some foreign forum. While the court cannot enjoin a foreign action, it could presumably punish the individual. *Cf.* 38 YALE L.J. 261, 262 (1928) ("A person within equity's jurisdiction may be enjoined from doing any act even outside the territorial jurisdiction of the court.").

161. The draft convention adopted at Madrid provided that "after the establishment of the limitation fund no right can be exercised relating to claims for which the shipowner is entitled to limit his liability against any other of his assets." MADRID CONFERENCE 578. In order to prevent the owner from establishing the fund in completely unaccessible locations, article 1 of the Madrid draft enumerated alternative locations where the fund might be established. *Id.* at 582.

162. "The provision which requires all things to be enforced in that forum chosen by the owner is not acceptable to the United States . . . . [T]he forum should be as much a matter of right for the claimant, who, after all, is the injured person, rather than being solely the right of the shipowner." Statement of American Delegate, Brussels Debates, Afternoon Sess., Oct. 1, 1957, at 16.

163. See MLA REPORT 4249 ("If the injunction of the court having jurisdiction of the limitation proceeding is recognized by Courts of other contracting nations . . . suit by claimants elsewhere will be prevented.").

164. See U.S. Delegation to the Diplomatic Conference on Maritime Law, Official Report, Nov. 18, 1957, p. 5 ("Another amendment will permit claimants to sue in the courts of their own country, rather than being compelled to bring their action in the jurisdiction where the shipowner chooses to file a proceeding, to limit his liability."). This position is also supported by Statement of E. Robert Seaver, MLA REPORT 4268.

claimants from access to domestic courts. Thus, while owner protection would be ensured by international concourse, these benefits are countervailed by the system's prejudicial effect on claimants who lack the means to institute foreign suits.[165]

Although article 2(4) allows accident victims to litigate claims in the courts of their home countries, its ambiguities undercut the utility of this privilege. Under the interpretation adopted by the British when the convention was incorporated into national law, constitution of a limitation fund in one nation precludes claimant recoveries from any other source.[166] In article 2(4) terms, once a claim is reduced to judgment anywhere, it becomes a "claim against the fund," and "no other assets" may be attached while the fund is "actually available." If this construction is accepted by the United States, a suit could be prosecuted under American substantive law, but the judgment would be enforceable only in the fund nation.[167]

While the British interpretation finds some support in convention debates,[168] it should be rejected for the same reasons that led to repudiation of

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See also *id.* at 4263 (convention actually invites claimants to bring suits wherever they please).

The British also seem to have accepted this interpretation by allowing claimants to file their claims in Britain although a fund is constituted elsewhere. See note 166 *infra* and accompanying text.

The Brussels provision can be contrasted with the Rome Convention of 1952 which explicitly prevents suits against air carriers in any nation except the one where the accident occurred. See DRION, *op. cit. supra* note 143, at 338.

165. Suits in foreign nations by American claimants would involve expenses and complexities not present in domestic litigation. See Comment, 25 U. CHI. L. REV. 377 (1958).

166. Merchant Shipping (Liability of Shipowners and Others) Act, 1958, 6 & 7 Eliz. 2, c. 62, § 6(1):

> No judgment or decree for a claim founded on a liability to which a limit is set . . . shall be enforced, except so far as it is for costs, . . . if security for an amount not less than the said limit has been given, whether in the United Kingdom or elsewhere, in respect of the liability or any other liability incurred on the same occasion and the court is of opinion that the security is satisfactory and is satisfied that the amount for which it was given or such part thereof as corresponds to the claim will be actually available to the person in whose favour the judgment or decree was given or made.

For a discussion of the "actually available" clause, see note 171 *infra.*

Great Britain has not adopted the convention as such, but has altered its existing law to conform to convention provisions, and is thus considered to be a ratifying nation. Great Britain filed instruments of ratification at Brussels. See Letter From John W. Mann, Ass't Chief, Shipping Division, Dep't of State, to *Yale Law Journal*, May 13, 1959, on file in Yale Law Library. Since Britain is a ratifying party and since the aims of the convention's art. 2(4) and the English statute's § 6(1) seem to be the same, the latter provision is undoubtedly an interpretation of the former.

167. This problem may be less acute than it appears since there is some indication that in most large maritime disasters shipowners constitute the fund in the United States. See MLA REPORT 4262.

168. During the debates on art. 5, which prevents multiple arrests, see note 202 *infra* and accompanying text, it was claimed that art. 5 complemented art. 2, since both pre-

international concourse. A local litigant attempting to collect a judgment in an alien tribunal may encounter difficulties equal to those confronting a suitor forced to prosecute his entire claim abroad.[169] Generally, absent explicit reciprocity agreements, many courts will either refuse recognition to, or scale down, awards made by foreign courts.[170] Thus, litigants may be subjected to a trial de novo even though they have already obtained foreign judgments. True, the "actually available" clause might be interpreted to allow local judgment collection if foreign enforcement is not forthcoming.[171] But this would still subject claimants to the expense and inconvenience of additional litigation, unless it can be determined in advance that the fund forum will not honor foreign judgments. Had the convention provided a method of international judgment enforcement, local litigants could avoid the uncertainties of the British approach; but the draftsmen considered this problem beyond the scope of their authority.[172] As presently conceived, then, claimants may be forced to

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cluded claimants from forcing the shipowner to establish funds in more than one country, see Brussels Debates, Afternoon Sess., Oct. 8, 1957, at 7, 15; Brussels Debates, Morning Sess., Oct. 8, 1957, at 22 (Israeli delegate says art. 2 protects owners "so that they are not compelled to set up limitation funds at various places or be liable to be sued and to have to pay at various jurisdictions").

169. See DRION, *op. cit. supra* note 143, at 338 ("Execution of foreign judgments is a subject . . . beset with difficulties").

170. See GILMORE & BLACK 725 (limitation decrees do not receive international recognition); Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical-Critical Analysis*, 16 LA. L. REV. 465, 480 (1956); Lenhoff, *Reciprocity in Function: A Problem of Conflict of Laws, Constitutional Law, and International Law*, 15 U. PITT. L. REV. 44, 64 (1953) (law of the forum may "condition its good-neighborly attitude upon the reciprocal conduct of the foreign state"); Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 789 (1950); Schneeberger, *Reciprocity as a Maxim of International Law*, 37 GEO. L.J. 29 (1948). *But cf.* Applewhaite v. The S.S. Sunprincess, 150 F. Supp. 827, 828 (S.D.N.Y. 1956) (court refuses to reexamine foreign settlement "because of considerations of international comity and expediency"). See generally Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087 (1956). Britain automatically recognizes foreign admiralty judgments even absent reciprocity. See MARSDEN, *op. cit. supra* note 156, at 242.

Also, some courts might consider limitation actions as claims against a fund-res and afford the judgments the usual validity afforded foreign admiralty in rem proceedings. *Cf.* GILMORE & BLACK 640-41; Reese, *supra* at 791.

171. The "actually available" clause was apparently inserted to allow claimants against a fund to attack other owner assets if the fund became unavailable because of currency restrictions, war or other contingencies. See Brussels Debates, Afternoon Sess., Oct. 1, 1957, at 10-11. See also The Ioannis P. Goulandris, 140 F.2d 780, 782 n.2 (2d Cir.), *cert. denied*, 322 U.S. 755 (1944) (shipowner raises frozen funds argument). But its scope was never fully discussed.

172. The United States introduced a motion which would have required the courts of nations where bail was furnished under art. 5 to recognize the judgments of other courts but it was defeated. See Brussels Debates, Afternoon Sess., Oct. 8, 1957, at 9, 11. Defeat was largely due to the resistance of British and French delegates who were opposed to discussing matters of judgment enforcement. "You cannot possibly force upon the jurisdiction of the first arrest the decision of the court of the jurisdiction of the

relitigate their entire action in a foreign forum, and the ghost of international concourse will continue to haunt limitation law.

Should the United States ratify the convention, it can avoid the consequences flowing from this "single fund" doctrine by attaching an interpretation to article 2(4).[173] The prohibition therein against distraint of nonfund assets is directed solely towards "claimants against the fund."[174] Murky at best, this phrase could be construed as including only persons suing within the fund nation, for in a narrow sense they alone are "claiming against the fund."[175] Hence, both right and remedy will be available to American nationals in local courts. Though arguably inconsistent with other provisions which apparently contemplate only one fund,[176] such an interpretation is justifiable in the interests of claimant protection. Moreover, this construction is consistent with that part of the convention which seemingly anticipates claims being paid worldwide.[177] And it leaves article 2(4) with a meaning compatible with convention goals; once the fund is distributed, suitors are prevented from seeking further awards through suits in nonfund forums.[178]

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second arrest. Otherwise, you get into terrible trouble." Statement of British Delegate, *id.* at 10. "In this Convention relating to limitation you are being asked to determine when the decisions of foreign courts in other countries are to be binding. This is a question which cannot be submitted to you . . . . [I]t is not within the province of our Conference to consider it." Statement by French Delegate, *id.* at 11.

173. The United States may interpret the convention in enabling legislation in the same manner that the British have done. See Merchant Shipping Act, 1958, 6 & 7 Eliz. 2, c. 62.

174. See art. 2(4).

175. "I would assume . . . that it [art. 2(4)] would not preclude a person who has not asserted a claim against the fund from suing in some other jurisdiction." Statement of Clarence G. Morse, Federal Maritime Administrator (Chairman, United States Delegation), Brussels Debates, Afternoon Sess., Oct. 8, 1957, at 7.

176. Art. 5 in particular seems to comprehend the establishment of only one fund. Other references to a single fund can be found in arts. 2(2), 4.

177. Art. 3(4) permits the owner to credit against the fund amounts he has paid claimants in other nations. Mr. Matteson argued that:

> The provisions of Art. 3(4) protecting the shipowner in case of payment of a foreign liability are not inconsistent with this view [that art. 2(4) applies to all claims wherever situated,] since they may and would apply to liability incurred in a nonadherent state, and may also apply in the event a court of some adherent state might take a view at variance with the above.

MLA REPORT 4250. But art. 3(4) refers specifically to claims paid under art. 1(1) which in turn refers to limitation "in accordance with . . . this Convention." Thus, it might be argued that the section was intended to apply to judgments paid in convention nations as well as those paid elsewhere. The United States delegation apparently accepted this interpretation as they viewed the foreign credit as an alternative to international concourse. See Brussels Debates, Afternoon Sess., Oct. 1, 1957, at 16.

In any event, Matteson seems to concede that the United States could adopt a "variant" view which would allow claimants to recover judgments in this country notwithstanding the establishment of a fund in some other nation.

178. This interpretation would answer the objections that the convention destroys domestic concourse, see MLA REPORT 4263, since it ensures that injunctions against

Although the British interpretation prohibiting judgment collection in a non-fund nation should not be adopted in the United States and elsewhere, other convention provisions might possibly overcome the problems it was designed to resolve. In the past, the existence of more than one fund occasionally resulted in owner payments exceeding established limits, and always involved the expense of maintaining large monetary deposits, or posting bonds, throughout the world. This latter evil could not previously be avoided, for many nations demanded that the total fund be paid into court, or that a bond be posted, as a condition precedent to limitation.[179] But under the convention, the deposit problem can be substantially eliminated if the establishment of a full fund in one signatory nation were deemed sufficient security for the invocation of limitation in the courts of all other adherents.[180] Indeed, this interpretation would rationalize various convention references to a single fund.[181]

Unfortunately, preventing owner liability greater than the tonnage formula will prove more difficult. The convention provides for a "foreign claims credit" which is apparently designed to avoid over-ceiling payments.[182] The forum is required to offset the pro rata share that foreign claimants who have already been paid would have received had they sued locally,[183] and is permitted (but not required) to set aside a sufficient amount to cover future foreign claims.[184]

But even in the simplest case—invocation of the credit in a fund court[185]—the branch of this scheme dealing for future claims fails as an operative solution. Assuming that the court is willing to apply the foreign credit,[186] it may be unable to do so. The convention does not provide a time limit for instituting damage suits, but incorporates the rules of the nation where suit is brought.[187] And if the laws of the various claimant nations provide for rela-

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claimants subject to the jurisdiction of the concourse-court will be enforced. Moreover, the *Report*'s contention is unsupportable in light of art. 4's provision that "the rules relating to the constitution and distribution of the limitation fund, if any, and all rules of procedure shall be governed by the national law of the State in which the fund is constituted."

179. See ADMIRALTY R. 51 (United States); Brussels Debates, Afternoon Sess. Oct. 1, 1957, at 8 (Britain); *ibid.* (Netherlands). *But see id.* at 5 (in Sweden fund not condition precedent to limitation).

180. This interpretation would be consistent with art. 5, which was designed to relieve the owner from the burden of establishing more than one fund. If, however, this proposal is disadvantageous to claimants because a particular owner does not seem to have sufficient assets to satisfy a judgment rendered against him, then the "actually available" clause might be utilized in the same manner suggested for art. 5. See text accompanying note 213 *infra*.

181. See note 176 *supra*.

182. Arts. 3(3)-(4).

183. Art. 3(3).

184. Art. 3(4).

185. The "fund-court" refers to the court in which the fund is first constituted.

186. Only England has previously used this system. See note 156 *supra*. See also 68 HARV. L. REV. 706, 708 (1955).

187. Art. 5(5). See also art. 4.

tively long periods of time, the owner will probably be unable to prove the existence of future foreign claims to the fund court's satisfaction before the limitation proceeding terminates.[188] Arguably, this problem is mooted by provisions in shipowner contracts restricting the time for filing claims.[189] But the enforceability of private statutes of limitation varies from nation to nation and is subject to unilateral change at any time.[190] And, even if these clauses were universally enforceable, only parties contractually related to the limiting owner are bound thereby. Claimants on other ships and shorebound victims remain subject solely to the general statute of limitations, or the doctrine of laches, depending on the law of the nation in which they sue.[191]

Since the owner will be unable to prove future foreign claims, the fund court must either ignore them, and thus make over-ceiling owner payments likely, or attempt to estimate them. Overestimation will harm fund-nation claimants; underestimations will damage owners. A method of prediction which will reconcile claimant and owner interests is necessary.

When the initial limitation proceeding is concluded, the court should first add all claims successfully prosecuted in the forum to all foreign judgments already obtained. Then, it should estimate, using, perhaps, predictive techniques developed by American admiralty courts,[192] the extent of anticipated foreign claims. At this point, estimates should be made as liberally as possible; the owner's allegation should be given a presumption of correctness. Judgments should then be partially liquidated and the balance of the owner's bond will represent the predicted foreign credit. As foreign claims are paid and proved, the bond will be correspondingly reduced. If, after a reasonable time has elapsed, foreign payments have not equalled the bond, the owner will

188. The necessity for a time limit to ensure the effectiveness of credit provisions has been noted before. See 68 HARV. L. REV. 706, 708 (1955).

189. See, *e.g.*, clause 10 of the ticket reproduced in Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 209 (2d Cir. 1955).

190. In the United States ticket stipulations are invalid when applied to personal injury and death claims if they provide for notice periods shorter than six months and require suits to be instituted before one year. See Limitation Act § 183b, 49 Stat. 960 (1935), 46 U.S.C. § 183b (1952). Until the act was passed such stipulations were valid. See Hubbard v. Matson Nav. Co., 34 Cal. App. 2d 475, 476-77, 93 P.2d 846, 847 (1939), *cert. denied*, 310 U.S. 628 (1940) (citing cases). See also 36 MICH. L. REV. 136 (1937).

For the law of other countries see MLA REPORT 4259 (stipulations valid in Britain); Mulvihill v. Furness, Withy & Co., 136 F. Supp. 201, 203 (S.D.N.Y. 1955) (provisions of ticket assume that stipulation probably valid everywhere except United States); Witte v. Nederlandsch Amerikaansche Stoomvart Maatschappiaj, 96 F. Supp. 485, 486 (D.N.J. 1951) (same); Rosenthal v. Compagnie Generale Transatlantique, 14 F.R.D. 33 (S.D. N.Y. 1953).

191. In the United States, for example, marine claims are measured by laches unless the suit is brought under a particular statute such as the Jones Act. See GILMORE & BLACK 295-96, 630, 634-37.

192. Under the Limitation Act concourse is denied unless the total amount of claims exceeds the owner's limit. See GILMORE & BLACK 687-90. When computing the total amount of claims a court must consider claims which may be filed in the future. See Petition of Trinidad Corp., 229 F.2d 423, 429 (2d Cir. 1955).

liquidate the remainder, and forum claimants will receive a supplementary distribution.[193]

Invoking the foreign credit in a nonfund nation [194] presents additional difficulties. The convention refers only to credits against a "fund."[195] Arguably, when there is no fund, a court is not required to consider even foreign awards. This interpretation, however, would lead to ludicrous results. Suppose, for example, that a claimant sues in a nation where no other actions have been instituted. Since his claim will almost certainly be less than the owner's total limited liability, a court ignoring foreign payments already made would grant full compensation. Should this be the rule, each claimant would try to find a forum in which he could sue alone.[196] Not only would this be manifestly unfair to those parties financially unable to seek a favorable jurisdiction, but it would destroy the convention's usefulness in international accommodation and owner protection.

Admittedly, the patent undesirability of this result may indicate that the convention never contemplated judgment collection in nonfund countries.[197] On the other hand, the foreign credit provisions might mean that each forum-nation is to establish a separate fund.[198] The references in the credit provision to "setting aside a portion of the fund" could be viewed, however, as alluding to an amount of money paid into court *after* judgment has been rendered locally. Since there will be nothing to set aside as representing the share accorded foreign claims without a fund, the credit amount must be paid into court, or a bond posted, at the conclusion of domestic litigation. As the owner proves actual foreign payment, he is to be reimbursed.

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193. A similar system obtains in bankruptcy proceedings with regard to unclaimed funds; the court retains jurisdiction for five years. See Bankruptcy Act § 66, 30 Stat. 564 (1898), as amended, 11 U.S.C. § 106 (1952), as amended, 11 U.S.C. § 106 (Supp. V, 1958); 28 U.S.C. § 2042 (1952). See also Greene, *Admiralty Law—An Overall Picture*, 1958 INS. L.J. 253, 254 (comparing limitation proceedings to bankruptcy).

Arguably, claimants will be disadvantaged by losing the right to challenge the authenticity of foreign claims. See Petition of Trinidad Corp., 229 F.2d 423, 428 (2d Cir. 1955) (concourse allows claimants to minimize competing claims). But the opportunity is presently lost whenever an owner makes an out-of-court settlement. Claimants can, however, challenge the reasonableness of the settlement. See *id.* at 429. See also Applewhaite v. The S.S. Sunprincess, 150 F. Supp. 827, 828 (S.D.N.Y. 1956) (refusing to review foreign settlement). A similar remedy can be provided for the foreign claim.

194. A "nonfund" nation is one that does not require the establishment of a fund as a condition precedent to limitation.

195. Art. 3(3)(4).

196. The *MLA Report* suggests that claimants not prohibited from bringing suits by art. II(4) may not even be subject to limitation. MLA REPORT 4250. This interpretation seems to be completely disproved by the British statute, which applies limitation to claims brought within England although the fund is constituted elsewhere. See note 166 *supra* and accompanying text.

A claimant usually cannot sue in more than one nation at the same time. See MARSDEN, COLLISIONS AT SEA 241 (10th ed. 1953); note 160 *supra*.

197. See note 166 *supra* and accompanying text.

198. See note 180 *supra* and accompanying text.

Superficially, this plan restores the multifund procedure which existed prior to the convention. Unlike prior law, however, the fund will represent only the amount of unsatisfied claims, and need not be established before trial. Moreover, the size of the nonfund court "fund" will be substantially less than 207 dollars per ton, and many foreign payments will be proved concurrently with the conclusion of local proceedings.

Propounding procedures is one thing, implementing them another. The precatory and uncertain nature of the credit for future foreign claims may well nullify shipowner benefit. To illustrate, assume that the tonnage formula produces a limitation figure of 200, and that a fund of that amount is constituted in country *X*. Assume also that claims for that amount are filed there and that claims later will arise for an additional 200 in *Y*. If the *X* court refuses the credit because, for example, *X* does not recognize the substantive basis of the *Y* claims,[199] or errs in predicting *Y* claims, the owner's foreign liability will be recognized as less than the actual total of 200. Suppose that the credit granted is fifty, which would be consolidated with the 200 in claims filed locally. The recovery ratio would then be eighty per cent (200 local claims/250 total). Domestically, this would produce recoveries of 160. When, during litigation in *Y*, the owner seeks to credit damages he paid in *X*, the *Y* court will face the difficult task of determining the extent of his *X* credit in light of the imperfect application of the *Y* credit in *X*.

If the *Y* court treats claims paid in *X*—160—as if they were before the forum, it would treat total claims as 360. A *Y* litigant would therefore receive only $^{200}/_{360}$, or fifty-six per cent of his claim. Opposition would doubtless be forthcoming from both shipowner and *Y* claimant. The owner would insist that since the convention limits his liability to 200, and he has already paid 160, *Y* suitors are entitled only to forty ($^{40}/_{200}$, or twenty per cent of their claims). But this result is too prejudicial to local claimants to be probable. *Y* claimants, on the other hand, will most likely insist upon the maintenance of international parity, *i.e.*, the same eighty per cent recovery granted in *X*.

In order to prevent the errors of one nation from infecting the awards of

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199. Art. 3(3) limits the credit to amounts "that the claimant whose claim [the owner] has paid would have had a right of recovery against him under the national law of the State where the fund has been constituted." Under this provision, if *A* sues owner in the United States, recovering $10,000, and the laws of the fund-nation would have allowed recovery of only $5,000, *A*'s claim can be credited only to the extent of this latter amount. Understandably, an assembly concerned with limitation hesitated to interfere with what it considered to be substantive rules of liability. But as a result, the complexities arising from the international divergence of collision liability formulas, see GILMORE & BLACK 438-42; GRIFFIN, AMERICAN LAW OF COLLISION 565-66 (Knauth ed. 1949); Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 CALIF. L. REV. 304 (1957), are imported into both the present and future credit provisions.

The resultant confusion can be ameliorated if courts adopt conflict of laws rules that eventuate in one law testing all claims, such as law of the flag. See note 21 *supra* and accompanying text.

all others, courts should apply the foreign credit on the basis of claims filed in other countries, irrespective of the recovery ratio there employed. Thus, in the hypothetical, the *Y* court would regard the action as if 400 in claims were filed against a fund of 200. Each claimant in *Y* would therefore receive a fifty per cent recovery—or a total of 100. True, the shipowner would still pay over his limit to the extent of the errors of any nation. But this method clearly represents the intention of the draftsmen, since, if applied accurately by every court, total liability will exactly equal the convention limit,[200] although uniform and unerring application seems pragmatically doubtful.

Arrest

Although the convention does not effectively protect the owner from multiple litigation, it does prevent the arrest of his ship in each potential forum. If the ship is initially impounded in a country where the bail furnished is "actually available" to claimants, the courts of nations where the vessel is subsequently arrested must release it without additional security.[201] Although this provision was designed primarily to ensure uninterrupted voyages,[202] all but the arresting court, according to one view, are thereby stripped of jurisdiction.[203] Thus, claimants would be forced to bring suit in a foreign land. In support, this view cites the defeat of an American motion which would have specifically allowed the releasing court to retain jurisdiction if the initial bail was deposited in an inconvenient forum.[204] Actually, though, debates reveal

200. The system would work perfectly even if more than two nations were involved. Assume four nations with 200 claims filed in each and a total limit under the convention of 100. Each nation would grant claimants $^{100}/_{800}$, or 12½% of their claims. Thus, the amount paid in each nation would be 25 (12½% of 200), with an overall total equaling 100.

201. Art. 5.

202. See Brussels Debates, Afternoon Sess., Oct. 8, 1957, at 14 (remarks of Norwegian delegate). The great inconvenience of multiple arrests is that the vessel must cease operation until a bond is posted. See Mangone v. Moore-McCormack Lines, Inc., 152 F. Supp. 848, 854 (E.D.N.Y. 1957). See also 6 BENEDICT 9 (international convention on arrest).

The addition of "property" as well as ships to the arrest provisions seems to have been an afterthought. See Brussels Debates, *supra* at 15. See also 40 HARV. L. REV. 314 (1926).

203. See MLA REPORT 4249, 4250. The *Report* additionally argued that in rem jurisdiction cannot exist without control of the res. *Id.* at 4250.

204. The serious possibility that claimant [*sic*] will be prevented even from bringing suit in another jurisdiction to establish their claims is emphasized by the opposition to, and defeat of, Mr. Houston's clarifying amendment to make the right of claimants to sue elsewhere to establish their claims clear.

Id. at 4249. The American motion reads as follows:

> If a court orders the release of a ship or bail under any of the circumstances mentioned [in art. 5] such court may nevertheless adjudicate the merits of the claim of claimants if it is of the opinion that the forum in which the bail or other security is given is not a convenient forum for the adjudication of such claims. Any

that the proposed amendment was rejected only because delegates believed that the second court would always have jurisdiction, whether or not the first forum is inconvenient.[205] Thus, the releasing forum's jurisdiction is left to the requirements of national law.[206]

United States law will allow retention of jurisdiction even after the ship's release. Admiralty courts can retain in rem jurisdiction after a limitation petition has been filed although they no longer control the res.[207] Even absent a limitation petition, the owner's motion to have the ship released could possibly be treated as a personal appearance allowing in personam jurisdiction.[208] In any event, Congress could adopt the English practice of statutorily requiring the owner to submit to the court's jurisdiction as a condition precedent to release.[209]

With jurisdiction retained, American claimants will not be seriously disadvantaged by the ship's release. Once judgment is rendered, other owner assets may be attached.[210] Hence, unless the owner has terminated all opera-

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final decision of such court shall be recognized as enforceable by the court in which the prior bail or security has been lodged.

Brussels Debates, Afternoon Sess., Oct. 8, 1957, at 2.

205. See remarks of British delegate, *id.* at 9:

> If a tribunal in whose jurisdiction a vessel has been arrested decides under the Convention to release the vessel from arrest, the question whether that tribunal can or cannot try the action, is we would say, on its merits, it is a question of local law entirely. The fact that the vessel has been released from arrest may not in some jurisdictions—it certainly would not in ours—prevent the court from trying the action on its merits . . . . If you put this [the American motion] in the Convention, it means that the court in whose jurisdiction the ship is released from a second arrest can only exercise the jurisdiction it may have had for centuries if it is satisfied that the place where the fund was put up is not a fit place to try the action. . . . I may have misunderstood the purpose of the amendment . . . but it seems to me that far from increasing the jurisdiction of the court of the place of the second arrest, it curtails it.

206. *Ibid.*

207. See *In re* Morrison, 147 U.S. 14, 23-26 (1893) (filing of libel gave court jurisdiction which couldn't be lost by removing ship); *cf.* In the Matter of Wood, 124 F. Supp. 540 (S.D.N.Y. 1954). Or, the court could retain jurisdiction on equitable grounds. See Just v. Chambers, 312 U.S. 383, 386 (1941); Hartford Acc. & Indem. Co. v. Southern Pac. Co., 273 U.S. 207, 215, 217 (1927). See also The Nettie Moore, 270 Fed. 1005 (D. Md. 1921). *But cf.* The Chickie, 141 F.2d 80, 85 (3d Cir. 1944).

208. See CHESHIRE, PRIVATE INTERNATIONAL LAW 110 (5th ed. 1957) (if owner of arrested ship gives bail he submits himself to jurisdiction of the court). *But see* The City of Singapore, 68 F. Supp. 164, 165 (S.D.N.Y. 1946) (filing of claim to libeled vessel together with answer did not give court in personam jurisdiction).

209. Merchant Shipping (Liability of Shipowners and Others) Act, 1958, 6 & 7 Eliz. 2, c. 62, § 5(1) ("[W]here the release is ordered the person on whose application it is ordered shall be deemed to have submitted to the jurisdiction of the court to adjudicate on the claim . . . ."). This provision has been characterized as "remarkable." Kahn-Freund, *Merchant Shipping (Liability of Shipowners and Others) Act, 1958*, 21 MODERN L. REV. 645, 646 (1958).

210. This statement assumes, of course, that the British interpretation of art. II(4),

tions prior to judgment, one of his ships will almost certainly appear in the United States within a reasonable time.[211] Indeed, most large shipowners do a continuing business here, so that assets will always be readily available to judgment creditors.[212] On occasion, the release provisions may in fact increase claimant recoveries by allowing shipowners to maintain normal operations in a strong charter market. A continuing profit flow is thus ensured and, accordingly, the shipowner's ability to satisfy judgment is buttressed. But if domestic judgments are unenforceable in the fund nation, or can be collected only with difficulty, American courts might invoke the "actually available" clause and refuse release.[213] On the other hand, if the United States enters reciprocity agreements allowing claimants to obtain automatic enforcement of their judgments,[214] release should be granted without bail as a matter of course.

CONCLUSION

Largely outmoded in an age of insurance, limitation is justified primarily by considerations of international parity. If the United States were unilaterally to abolish limitation, American interests would be jeopardized. While limitation might also be denied foreign shipowners in American courts,[215] foreign nations could retaliate.[216] Moreover, international tensions created by American denial of limitation to foreigners might force the United States eventually to recognize other nations' limitation statutes, particularly when no American claimants were involved.[217] In either event, American owners would experience disproportionate insurance rate increases, and would be forced to raise

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see note 166 *supra* and accompanying text, is rejected. Once a judgment is rendered by any district court sitting in admiralty, the judgment may be registered and enforced in any other district court. See ADMIRALTY R. 22; 28 U.S.C. § 1963 (Supp. V, 1958); MOORE, COMMENTARY ON THE JUDICIAL CODE 382-85 (1949).

211. *Cf.* British Transp. Comm'n v. United States, 354 U.S. 129, 142 (1957).

212. See Note, 66 YALE L.J. 121, 129 (1956).

213. See note 171 *supra*.

214. See Honig, *Reciprocal Recognition and Enforcement of Foreign Judgments*, 107 L.J. 787, 789 (1957); Nadelmann, *Reprisals Against American Judgments*, 65 HARV. L. REV. 1184, 1191 (1952).

215. *Cf.* Springer, *Amendments to the Federal Law Limiting the Liability of Shipowners*, 11 ST. JOHNS L. REV. 14, 26 (1936) (no competitive disadvantage from increased limits since American Act applies to foreign owners).

216. See Petition of United States for Certiorari, p. 18, Black Diamond S.S. Corp. v. Robert Stewart & Sons, 336 U.S. 386 (1949) (discussing reprisal in connection with application of Limitation Act to foreign owners); *cf.* Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical-Critical Analysis*, 16 LA. L. REV. 465, 466 (1956) (reprisal part of notion of reciprocity). *But cf.* Reply Brief, p. 6, Black Diamond S.S. Corp. v. Robert Stewart & Sons, *supra* (discounting possibility of reprisals among allies).

217. Even the courts have noted the unfairness of depriving a shipowner of his national limitation statute. See Lauritzen v. Larsen, 345 U.S. 571, 591-92 (1953) ("Because a law of the forum is applied to plaintiffs who voluntarily submit themselves to it is no argument for imposing the law of the forum upon those who do not.") (dictum); British Transp. Comm'n v. United States, 354 U.S. 129, 143-46 (1957) (dissenting opinion).

passenger and cargo rates to noncompetitive levels.[218] The resultant decrease in profits would have to be compensated by subsidies if the present flight to flags of convenience were not to be spurred. Arguably, subsidies should be paid from the general coffers rather than the pockets of injured claimants.[219] But this approach overlooks the advantages to be garnered from the adoption of an internationally uniform law. Admittedly, uniformity alone is not sufficient justification for the adoption of unwise policies. But if uniformity is achieved through statutory provisions which markedly increase claimant protection in all nations, though the increase is not as large as might be achieved by unilateral action, such uniform rules would appear desirable.

The Brussels Convention offers a needed uniform increase in fund limits, but the tendency of the participants to minimize or ignore areas of conflict resulted in ambiguities and contradictions which threaten both claimant and owner protection. Fortunately, the convention's language is flexible enough to permit congressional interpretations which may eliminate some of the convention's weaknesses.

Uninterpreted, the convention should be rejected. If, on the other hand, the suggested constructions are accepted, adoption of the convention would have its greatest impact on American law through increase in limits. This result, while desirable, might have been achieved by simply amending the Limitation Act. Moreover, interpretations of the convention will undoubtedly differ substantially from nation to nation, thereby eliminating any likelihood that meaningful uniformity will be achieved. Ratification can be justified, therefore, only by its effects on other nations. Countries favorably disposed towards the Brussels draft may hesitate to ratify before the convention is accepted by the major maritime powers. If they are induced to ratify by American example, and follow American interpretations, a foundation might be laid for a future international agreement which will provide truly universal limitation law.

APPENDIX A

INTERNATIONAL CONVENTION RELATING TO THE LIMITATION OF THE LIABILITY OF OWNERS OF SEAGOING SHIPS

Article 1

(1) The owner of a seagoing ship may limit his liability in accordance with Article 3 of this Convention in respect of claims arising from any of the following occurrences, unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner:

(a) Loss of life of, or personal injury to, any person being carried in the ship, and loss of, or damage to, any property on board the ship;

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218. See Kuhn, *International Aspects of the Titanic Case*, 9 AM. J. INT'L L. 336, 348 (1915); note 55 *supra* and accompanying text.

219. See Maryland Cas. Co. v. Cushing, 347 U.S. 409, 437 (1954) (dissenting opinion). See also note 2 *supra*.

(b) Loss of life of, or personal injury to, any other person whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect or default the owner is responsible or any person not on board the ship for whose act, neglect or default the owner is responsible: Provided however that in regard to the act, neglect or default of this last class of person, the owner shall only be entitled to limit his liability when the act, neglect or default is one which occurs in the navigation or the management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers.

(c) Any obligation or liability imposed by any law relating to the removal of wreck and arising from or in connection with the raising, removal or destruction of any ship which is sunk, stranded or abandoned (including anything which may be on board such ship) and any obligation or liability arising out of damage caused to harbour works, basins and navigable waterways.

(2) In the present Convention the expression "personal claims" means claims resulting from loss of life and personal injury: the expression "property claims" means all other claims set out in paragraph (1) of this Article.

(3) An owner shall be entitled to limit his liability in the cases set out in paragraph (1) of this Article even in cases where his liability arises, without proof of negligence on the part of the owner or of persons for whose conduct he is responsible, by reason of his ownership, possession, custody or control of the ship.

(4) Nothing in this Article shall apply:

(a) to claims for salvage or to claims for contribution in general average.

(b) To claims by the Master, by members of the crew, by any servants of the owner on board the ship or by servants of the owner whose duties are connected with the ship, including the claims of their heirs, personal representatives or dependents, if under the law governing the contract of service between the owner and such servants the owner is not entitled to limit his liability in respect of such claims or if he is by such law only permitted to limit his liability to an amount greater than that provided for in Article 3 of this Convention.

(5) If the owner of a ship is entitled to make a claim against a claimant arising out of the same occurrence, their respective claims shall be set off against each other and the provisions of this Convention shall only apply to the balance, if any.

(6) The question upon whom lies the burden of proving whether or not the occurrence giving rise to the claim resulted from the actual fault or privity of the owner shall be determined by the lex fori.

(7) The act of invoking limitation of liability shall not constitute an admission of liability.

Article 2

(1) The limit of liability prescribed by Article 3 of this Convention shall apply to the aggregate of personal claims and property claims which arise on any distinct occasion without regard to any claims which have arisen or may arise on any other distinct occasion.

(2) When the aggregate of the claims which arise on any distinct occasion exceeds the limits of liability provided for by Article 3, the total sum representing such limits of liability may be constituted as one distinct limitation fund.

(3) The fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.

(4) After the fund has been constituted, no claimant against the fund shall be entitled to exercise any right against any other assets of the shipowner in respect of his claim against the fund, if the limitation fund is actually available for the benefit of the claimant.

Article 3

(1) The amounts to which the owner of a ship may limit his liability under Article 1 shall be:

(a) Where the occurrence has only given rise to property claims, an aggregate amount of 1000 francs for each ton of the ship's tonnage;

(b) Where the occurrence has only given rise to personal claims, an aggregate amount of 3,100 francs for each ton of the ship's tonnage;

(c) Where the occurrence has given rise both to personal claims and property claims an aggregate amount of 3,100 francs for each ton of the ship's tonnage, of which a first portion amounting to 2100 francs for each ton of the ship's tonnage shall be exclusively appropriated to the payment of personal claims and of which a second portion amounting to 1000 francs for each ton of the ship's tonnage shall be appropriated to the payment of property claims, provided however that in cases where the first portion is insufficient to pay the personal claims in full, the unpaid balance of such claims shall rank rateably with the property claims for payment against the second portion of the fund.

(2) In each portion of the limitation fund the distribution among the claimants shall be made in proportion to the amounts of their established claims.

(3) If before the fund is distributed the owner has paid in whole or part any of the claims set out in Article 1 paragraph (1) he shall pro tanto be placed in the same position in relation to the fund as the claimant whose claim he has paid, but only to the extent that the claimant whose claim he has paid would have had a right of recovery against him under the national law of the State where the fund has been constituted.

(4) Where the shipowner establishes that he may at a later date be compelled to pay in whole or in part any of the claims set out in Article 1 paragraph (1) the Court or other competent authority of the country where the fund has been constituted may order that a sufficient sum shall be provisionally set aside to enable the shipowner at such later date to enforce his claim against the fund in the manner set out in the preceding paragraph.

(5) For the purpose of ascertaining the limit of an owner's liability in accordance with the provisions of this Article the tonnage of a ship of less than 300 tons shall be deemed to be 300 tons.

(6) The franc mentioned in this article shall be deemed to refer to a unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. The amounts mentioned in paragraph (1) of this Article shall be converted into the national currency of the State in which limitation is sought on the basis of the value of that currency by reference to the unit defined above at the date on which the shipowner shall have constituted the limitation fund, made the payment or given a guarantee which under the law of that state is equivalent to such payment.

(7) For the purpose of this Convention tonnage shall be calculated as follows:

— In the case of steamships or other mechanically propelled ships there shall be taken the net tonnage with the addition of the amount deducted from the gross tonnage on account of engine room space for the purpose of ascertaining the net tonnage.

— In the case of all other ships there shall be taken the net tonnage.

Article 4

Without prejudice to the provisions of Article 3, paragraph (2) of this Convention, the rules relating to the constitution and distribution of the limitation fund, if any, and all rules of procedure shall be governed by the national law of the State in which the fund is constituted.

Article 5

(1) Whenever a shipowner is entitled to limit his liability under this Convention, and the ship or another ship or other property in the same ownership has been arrested within the jurisdiction of a contracting State or bail or other security has been given to avoid arrest, the Court or other competent authority of such State may order the release of the ship or other property or of the security given if it is established that the shipowner has already given satisfactory bail or security in a sum equal to the full limit of his liability under this Convention and that the bail or other security so given is actually available for the benefit of the claimant in accordance with his rights.

(2) Where, in circumstances mentioned in paragraph (1) of this article, bail or other security has already been given:

(a) at the port where the accident giving rise to the claim occurred;

(b) at the first port of call after the accident if the accident did not occur in a port;

(c) at the port of disembarkation or discharge if the claim is a personal claim or relates to damage to cargo;

the Court or other competent authority shall order the release of the ship, bail or other security given, subject to the conditions set forth in paragraph (1) of this Article.

(3) The provisions of paragraphs (1) and (2) of this Article shall apply likewise if the bail or other security already given is in a sum less than the full limit of liability under this Convention, provided that satisfactory bail or other security is given for the balance.

(4) When the shipowner has given bail or other security in a sum equal to the full limit of his liability under this Convention such bail or other security shall be available for the payment of all claims arising on a distinct occasion and in respect of which the shipowner may limit his liability.

(5) Questions of procedure relating to actions brought under the provisions of this Convention and also the time limit within which such actions shall be brought or prosecuted shall be decided in accordance with the national law of the Contracting State in which the action takes place.

Article 6

(1) In this Convention the liability of the shipowner includes the liability of the ship herself.

(2) Subject to paragraph (3) of this Article, the provisions of this Convention shall apply to the charterer, manager and operator of the ship, and to the master, members of the crew and other servants of the owner, charterer, manager or operator acting in the course of their employment, in the same way as they apply to an owner himself: Provided that the total limits of liability of the owner and all such other persons in respect of personal claims and property claims arising on a distinct occasion shall not exceed the amounts determined in accordance with Article 3 of this Convention.

(3) When actions are brought against the master or against members of the crew such persons may limit their liability even if the occurrence which gives rise to the claims resulted from the actual fault or privity of one or more of such persons. If, however, the master or member of the crew is at the same time the owner, coowner, charterer, manager or operator of the ship, the provisions of this paragraph shall only apply where the act, neglect or default in question is an act, neglect or default committed by the person in question in his capacity as master or as member of the crew of the ship.

Article 7

This Convention shall apply whenever the owner of a ship, or any other person having by virtue of the provisions of Article 6 hereof the same rights as an owner of a ship, limits or seeks to limit his liability before the Court of a Contracting State or seeks to procure the release of a ship or other property arrested or the bail or other security given within the jurisdiction of any such State.

Nevertheless, each Contracting State shall have the right to exclude, wholly or partially, from the benefits of this Convention any non-Contracting State, or any person who, at the time when he seeks to limit his liability or to secure the release of a ship or other property arrested or the bail or other security in accordance with the provisions of Article 5 hereof, is not ordinarily resident in a Contracting State, or does not have his principal place of business in a Contracting State, or any ship in respect of which limitation of liability or release is sought which does not at the time specified above fly the flag of a Contracting State.

Article 8

Each Contracting State reserves the right to decide what other classes of ship shall be treated in the same manner as sea-going ships for the purposes of this Convention.

Article 9

This Convention shall be open for signature by the States represented at the tenth session of the Diplomatic Conference on Maritime Law.

Article 10

This Convention shall be ratified and the instruments of ratification shall be deposited with the Belgian Government which shall notify through diplomatic channels all signatory and acceding States of their deposit.

Article 11

(1) This Convention shall come into force six months after the date of deposit of at least ten instruments of ratification, of which at least five by States that have each a tonnage equal or superior to one million gross tons of tonnage.

(2) For each signatory State which ratifies the Convention after the date of deposit of the instrument of ratification determining the coming into force such as is stipulated in para. (1) of this article, this Convention shall come into force six months after the deposit of their instrument of ratification.

Article 12

Any State not represented at the tenth session of the Diplomatic Conference on Maritime Law may accede to this Convention.

The instruments of accession shall be deposited with the Belgian Government which shall inform through diplomatic channels all signatory and acceding States of the deposit of any such instruments.

The Convention shall come into force in respect of the acceding State six months after the date of the deposit of the instrument of accession of that State, but not before the date of entry into force of the Convention as established by Article 11(1).

Article 13

Each High Contracting Party shall have the right to denounce this Convention at any time after the coming into force thereof in respect of such High Contracting Party. Nevertheless, this denunciation shall only take effect one year after the date on which notification thereof has been received by the Belgian Government which shall inform through diplomatic channels all signatory and acceding States of such notification.

Article 14

(1) Any High Contracting Party may at the time of its ratification of or accession to this Convention or at any time thereafter declare by written notification to the Belgian Government that the Convention shall extend to any of the territories for whose international relations it is responsible. The Convention shall six months after the date of the receipt of such notification by the Belgian Government extend to the territories named therein, but not before the date of the coming into force of the Convention in respect of such High Contracting Party;

(2) A High Contracting Party which has made a declaration under paragraph (1) of this article extending the Convention to any territory for whose international relations it is responsible may at any time thereafter declare by notification given to the Belgian Government that the Convention shall cease to extend to such territory. This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian government;

(3) The Belgian Government shall inform through diplomatic channels all signatory and acceding States of any notification received by it under this article.

Article 15

Any High Contracting Party may three years after the coming into force of this Convention in respect of such High Contracting Party or at any time thereafter request that a conference be convened in order to consider amendments to the Convention.

Any High Contracting Party proposing to avail itself of this right shall notify the Belgian Government which shall convene the conference within six months thereafter.

Article 16

In respect of the relations between States which ratify this Convention or accede to it, this Convention shall replace and abrogate the International Convention for the unification of certain rules concerning the limitation of the liability of the owners of seagoing ships, signed at Brussels on the 25th of August 1924.

In witness whereof the Plenipotentiaries, duly authorized, have signed this Convention.

Done at Brussels, this tenth day of October 1957, in the French and English languages, the two texts being equally authentic, in a single copy, which shall remain deposited in the archives of the Belgian Government, which shall issue certified copies.

APPENDIX B

STATUS OF CONVENTION IN OTHER NATIONS WHICH PARTICIPATED IN THE BRUSSELS DIPLOMATIC CONFERENCE

Country	*Status*	*Source*
		(Letter to *Yale Law Journal*, on file in Yale Law Library, from:)
Argentina	No information available at time of publication.	
Australia	Study under way on introduction of legislation.	R. C. Maley, Press Attache, Australian Embassy, May 22, 1959.
Austria	No legislation on subject and do not plan to sign in near future inasmuch as they have no merchant marine.	Dr. Karl Fischer, Second Secretary, Austrian Embassy, May 12, 1959.
Belgium	No action taken.	René Mérenne, Secretary of Embassy, Belgian Embassy, June 17, 1959.
Brazil	No information available.	
Canada	No information available.	
Denmark	Committee under Ministry of Commerce considering ratification of the Convention as part of general revision of maritime law. (See under Norway.)	W. Thune Andersen, Secretary of Embassy, Danish Embassy, May 12, 1959.
Egypt	No information available.	
Federal Republic of Germany	Convention under examination.	Heinz Capellmann, Consular Secretary, German Embassy, June 22, 1959.
Finland	Will ratify simultaneously with other Scandinavian countries. (See under Norway.)	Paavo Laitinen, Attache, Embassy of Finland, April 17, 1959.
France	Ratification presently before the President.	Captain Louis J. Audigou, Shipping Attache, French Embassy, May 27, 1959.
Great Britain	Convention ratified February 18, 1959.	Merchant Shipping (Liability of Shipowners and Others) Act, 1958, 6 & 7 Eliz. 2, c. 62.
Greece	Under study by Ministry for Mercantile Marine.	Alexis S. Liatis, Ambassador of Greece, Royal Greek Embassy, May 27, 1959.

Country	*Status*	*Source*
India	Convention under consideration.	S. G. Ramachandran, First Secretary (Commercial), Embassy of India, May 15, 1959.
Indonesia	No action taken.	Utoyo Sutoto, Commercial Secretary for the Head of the Economic Division, Embassy of Indonesia, April 16, 1959.
Iran	No action taken.	Dr. Parviz Mahdavi, Counselor, Iranian Embassy, May 6, 1959.
Israel	No information available.	
Italy	No action while awaiting opinion of shipping interests, but ratification unlikely since Convention is not in line with "Italian traditional juridical principles."	Gaetano Aulisio, Italian Technical Delegation, April 13, 1959.
Japan	Convention being studied. No action expected for a "rather long time."	Tomoya Kawamura, Vice Consul, Assistant Information Officer, Information Office, The Consulate General of Japan, March 31, 1959.
Morocco (non-participant)	Convention ratified, but will not take effect until other nations ratify.	John W. Mann, Assistant Chief, Shipping Division, U.S. Department of State, March 12, 1959.
Netherlands	In process of amending legislation for purposes of accepting Convention.	Drs. J. J. Schuld, Shipping Attache, Netherlands Embassy, May 7, 1959.
Norway	Legislation being prepared as part of joint Danish, Finnish, Norwegian and Swedish revision of maritime codes. No action expected before three years, but acceptance almost certain since all opinions favorable.	Assistant Manager, Nordisk Skibsrederforening, April 9, 1959.
Peru	No information available.	
Poland	No information available.	
Portugal	No information available.	
Spain	Currently under study by Spanish Parliament.	Santiago de Churruca, Second Secretary in Charge of Consular Affairs, Spanish Embassy, April 27, 1959.

Country	*Status*	*Source*
Sweden	Questions of Convention referred to Committee for Maritime Legislation of 1958. No decision expected before end of year. (See also under Norway.)	Stig Ramel, Secretary of Embassy, Royal Swedish Embassy, April 21, 1959.
Switzerland	No information available.	
U.S.S.R.	No information available.	
Vatican City	No information available.	
Venezuela	No action taken.	José Gil-Borges, Counselor, Venezuelan Embassy, June 8, 1959.
Yugoslavia	Ratification procedure under way.	Dr. Milan Bulajic, Second Secretary, Embassy of the Federal Peoples Republic of Yugoslavia, April 14, 1959.